# The Central Law Journal.

*ST. LOUIS, JULY 17, 1891.*


Our old and esteemed friend, the *American Law Register*, has at last succumbed to the fates and died. From what cause we know not, unless it be old age, though its demise, for some considerable period of time, has been expected. Within the past few days we have received notice from the assignee of what goods and chattels it had left, to the above effect, and we have construed it as a death notice, though not in the usual form. Thus passes away the oldest law newspaper of a general character published in this country. Though the *Legal Intelligencer*, also of Philadelphia, is somewhat older, it has never attained more than a local circulation, not aiming to publish anything except Pennsylvania matter. Of the law journals proper, now in existence, the *Albany Law Journal* is, perhaps, the oldest, though its birth precedes ours by only a few months. It was started in 1870, we believe, and this journal first saw the light of day in 1874. The *American Law Register* at one time had a strong hold upon the legal fraternity all over this country. Mr. Redfield and his able corps of editors gave it a reputation which lasted for many years, and long after it really ceased to deserve it. But, of late, it has been on the downward path, and, it is said, that nothing but the remarkable canvassing ability of its founder, Mr. Canfield, has kept it alive so long. None of the older practitioners and few of the newer ones will fail to recall that distinguished looking old gentleman, who for years has presented himself periodically, soliciting for the *Register*, having the bearing and manners of a supreme judge or other high dignitary. The death of this old and once well established law magazine prompts us to reflect, that even law journals are subject to the immutable laws of nature, and that for us, the only way to keep from dying is to keep and continue vigorously alive, which is not so easy a task as the legal profession are inclined to believe.

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The report of the proceedings of the Illinois State Bar Association, at its last meeting in January, comes to us illustrated, and we must say we like the innovation. It has photo-engravings of its last year's president, James B. Bradwell; of its efficient secretary, W. L. Gross, and of the gentlemen who delivered special addresses: Governor Fifer, Charles C. Bonney, Dr. De Laskie Miller, E. L. McDonald, M. W. Matthews, Seymour D. Thompson and Elliott Anthony. The pictures are all remarkably good, and the addresses were equally so. The report shows a lively interest by the members, in two especially, of the many proposed local reforms, viz: that having in view a consolidation and permanent sitting of the supreme court at one place in the State, and the reform in the system of land transfer and registration. The first we regard as a necessity. It is scandalous that a State like Illinois should compel its supreme judges to travel about like mountebanks, and exhibit here and there. This report shows, what we have for some time believed, that of all the State bar associations, that of Illinois is one of the most prosperous.

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Of the special addresses, Judge Seymour D. Thompson spoke interestingly of "the power of the people over corporate and individual combinations and monopolies." Charles C. Bonney discussed "the relation of the police power of the States to the commerce power of the nation." It was full of original thought and concluded with a series of rules, defining the boundaries and limitations of national and State jurisdiction, which are so admirable and contain in so few words a substantial interpretation of much of the federal constitution, that we reproduce them here for the benefit of our readers:

1. Congress has the power of regulation and control over the subjects of interstate commerce, the means of transportation, and the persons by whom such commerce is conducted.

2. The States have the power of regulation and control over their own people and internal affairs, including all merely domestic purchases and sales; and over all the uses to which articles that have become a part of the common mass of property in the State, may be applied.

3. The national government may regulate commerce of the specified classes committed to its charge, subject to the exception that the State governments may intervene and prevent the introduction of any articles which are in such a condition as to imperil the public health, morals or safety,—such, for example, as infected rags or obscene literature. Such articles are not proper subjects of commerce.

4. The State governments may regulate and govern

persons and things within their limits, subject to the exception that congress may regulate and control commerce among the several States; Provided, nevertheless, that the States may prohibit articles in such a condition as threatens the public health, the public morals, or the public safety.

5. The use and consumption of property are not commerce. Therefore, over such use and consumption, the authority of congress does not extend. The people of each State may decide for themselves the uses and purposes to which property may be applied within the State, and the conditions on which such application may be made.

6. Congress may declare how far the interstate traffic in intoxicants, or in any other articles, shall be free and untrammeled; how far it shall be burdened by conditions and restrictions, and how far it shall be prohibited.

7. The line of reconciliation between the police power of the States and the commerce power of the nation, is the co-operation of the State and national governments for the most effective protection of the health, the morals and the safety of the people in every part of the Union.

8. It is the duty of the courts of justice to take judicial notice of the course of commerce, and upon such notice to hold, when appropriate cases arise, that no articles or proceeding therein, which imperils the public health, the public morals or the public safety, is entitled to judicial protection against such regulations, restrictions or prohibitions as the police power, either State or national, may see fit to impose.

## NOTES OF RECENT DECISIONS.

HUSBAND AND WIFE—MARRIAGE — EXTINGUISHMENT OF NOTE.—The Court of Appeals of Kentucky, in Farley v. Farley, 16 S. W. Rep. 129, decide that a *feme sole* having given a note, secured by mortgage, to one whom she afterwards marries, the marriage extinguishes the debt, and the mortgage cannot be enforced after a decree of divorce by which each party is restored to any property acquired by one, directly or indirectly, from or through the other. Bennett, J., says:

The lower court decided that the subsequent marriage, under the circumstances, did not extinguish the said mortgage, and ordered the land sold, to pay the mortgage debt. By the common law, marriage has the legal effect of paying or extinguishing the debt that the husband might owe the wife, or the wife the husband, at the time of the marriage. By that law, the husband, by the marriage, became responsible for the debts due by the wife at the time, and became bound to provide for her comfort and maintenance during coverture; and, in return, all her personal estate, of whatever description, became absolutely his. If she, at the time of marriage, held a note on him, the note was, in law paid; it became him. If he held a note on her, it in law, was paid or extinguished by the marriage. If, at the time, she was indebted to him, say, $1,000, and possessed, say, $100,000, the law gave him said sum, and at the same time paid her debt to him. If she took $1,000 of this sum and paid the debt, she would take what already belonged to the husband by virture of the marriage. Suppose she were to say to the husband, "You got ten thousand dollars by me which ought to pay this debt," would he be permitted to say that he got what the law gave him, and as she owned a tract of land which the law did not give him, except the rent and use, he would subject that to the payment of the debt? Surely, a court of equity would not allow this. Surely, it would say to him, as the law gave him upon the marriage all the personal estate then owned or thereafter acquired by this woman, it also paid or extinguished her indebtedness to him. It would say to him, still more specifically, it is the right, without reference to the quantity received, to her personal estate and her earnings that pays or extinguishes her indebtedness to him. Now, this common-law rule prevails in this State, except as it is modified by statute, which modification consists in the wife's retaining the legal title to her real estate, and the husband's non-liability for the payment of any antenuptial debts of hers, except to the extent that he received personal estate from her by reason of the marriage. This non-liability is more favorable to him than was the common-law rule, which was intended to establish equality, in view of the fact that the statute allows her to retain the title to her real estate; but it does not have the effect not to pay any debt that might be due him, because he is yet entitled to all her personal estate, time, labor, and earnings; which should have the legal effect of paying or extinguishing her indebtedness to him. She could still say to him that the thousands of dollars that were once hers, and out of which she could have paid the debt, were now his; and her earnings, once hers, and out of which she could have paid the debt, were now his; and she, consequently, had nothing with which to pay. But he says: "You have land; pay me out of that:" but she says: "You have control of the rents and income from that land, and if I offer you that you will tell me that you are entitled to that by law. Yes, of course, give me the title; you have that left." But, instead, the common law says that it is the acquisition by the husband of this right, although never substantially realized, that pays the wife's indebtedness to the husband; and the reason of the rule exists, notwithstanding our statutory modifications. This common-law rule as to payment does not obtain where the antenuptial contract was not to be enforced during coverture, or where the wife, by either contract or the law, retains all her estate as a separate estate; then, in that case, the reason ceases, and equity will relieve against the rule. But such is not the case here.

## FORFEITURE OF MEMBERSHIP IN BENEFIT SOCIETIES FOR NON-PAYMENT OF CONTRIBUTIONS AND DUES.

### I.

1. Right of the Society to Provide for Forfeiture.
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1. *Right of the Society to Provide for Forfeiture.*—There seems to be no reasonable doubt but that benefit societies, mutual benefit societies and like organizations, may provide for forfeiture of membership, in event of default on the part of the member in the payment of contributions or assessments and dues, within a specified time after notice thereof.[1] The rules in this respect which have been applied to the old line and mutual life insurance companies do not materially differ from those applicable to the organizations under consideration. The necessity of the existence of this power in these organizations is obvious. If the obligations of members were not insisted on with strictness, the whole object of the association would be liable at any time to be frustrated; because if one member could be indulged beyond the limits prescribed, each and every one of them could claim similar indulgence, for in this respect they stand upon precisely the same footing, and the consequence might be an entire disappointment in the benefits to be received.[2] The stipulation as to forfeiture forms part of the contract between the member and the association, and like any other contract provision may be enforced. But where provisions of forfeiture do not exist, it seems that non-payment of contributions, assessments and dues does not operate to forfeit or suspend the membership.[3] The assessment is only a debt when there is an absolute promise to pay it contained in the contract. If it is not paid when due, of course the contract is, or may be, determined by its very terms. The payment of the assessment is regarded as a condition precedent of the liability of the society.[4] Where the forfeiture clause does not exist the obligation to pay the assessment arises from an independent contract, which is enforceable, and which does not affect the certificate of membership or policy.[5] In such case, assessments may be collected by suit.[6]

2. *Forfeiture for Non-payment of Dues.*—Benefit societies, or mutual benefit societies, are usually organized into grand or supreme bodies, and sometimes both, and subordinate or inferior lodges or bodies. At stated periods, either annually, semi-annually, quarterly, or monthly, certain payments are required of members which are usually denominated dues; and like assessments, if dues are not paid when they mature, a forfeiture of membership may result; but, of course, this depends upon the proper construction to be placed upon the rules of the particular organization. However, it must be remembered that dues cannot be fixed arbitrarily; the necessity for the exaction of them must appear. Thus, the amendment of a by-law of a fire company increasing dues from twelve and one-half cents to two dollars per month, where no necessity appears therefor, is unreasonable and void, and a member who did not assent thereto cannot be legally expelled for a refusal to pay the same.[7] Sometimes dues are made payable in advance; but when they are not so made by rule or uniform regulation, although they are usually demanded and paid a year in advance, such dues are "not in arrears" until the expiration of the year.[8]

3. *Rules of Construction of Forfeiture Provisions.*—To work a forfeiture it must be for a violation of the precise condition made.[9] Forfeitures are not favored; indeed, they are so odious in law that they will only be

[1] Passenger Conductors' Life Ins. Co. v. Birnham, 116 Pa. St. 565; McMurry v. Supreme Council Knights of Honor, 13 Ins. L. J. 569; Mound City, etc. Ins. Co. v. Twining, 12 Kan. 475; Alabama, Gold, etc. Co. v. Thomas, 74 Ala. 578; Maderia v. Merchants, etc. Society, 16 Fed. Rep. 749, 5 McCrary, 253; Beadle v. Chenango Co., 3 Hill (N. Y.), 161; Ill. Mut. Ben. Society v. Baldwin, 86 Ill. 479.

[2] Yoe v. Howard Masonic Mut. Ben. Assn., 63 Md. 86, 6 Am. & Eng. Corp. Cas. 641, 14 Ins. L. J. 404; May on Ins. § 55*a*, and cases cited.

[3] Sanford v. California, etc. Assn., 63 Cal. 547, 1 Am. & Eng. Corp. Cas. 188; Am. Ins. Co. v. Klink, 65 Mo. 78; Woodfin v. Asheville Mut. Ins. Co., 6 Jones L. (N. C.) 558.

[4] N. Y. Life Ins. Co. v. Statham, 93 U. S. 24; Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156; Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372; Dungan v. Mut. Ben. Life Ins. Co., 46 Md. 492.

[5] Sanford v. California, etc. Assn., 63 Cal. 547, 1 Am. & Eng. Corp. Cas. 188.

[6] McDonald v. Ross-Lewin, 29 Hun, 87; Sands v. Graves, 58 N. Y. 94; Thomas v. Whalten, 31 Barb. (N. Y.) 172; Pacific, etc. Ins. Co. v. Guse, 49 Mo. 329; Worthington, etc. Ins. Co. v. Stewart, 39 N. J. L. 486; Susquehanna, etc. Ins. Co. v. Gackenback, 115 Pa. St. 492, 9 Atl. Rep. 90.

[7] Hibernia Fire Engine Co. v. Commonwealth, 93 Pa. St. 264. See The London Tobacco Pipe Makers Co. v. Woodroffe, 7 B. & C. 838.

[8] Wiggins v. Knights of Pythias, 31 Fed. Rep. 122, 16 Ins. L. J. 754.

[9] Bates v. Detroit, etc. Assn., 51 Mich. 587, 1 Am. & Eng. Corp. Cas. 186.

enforced where there is the clearest evidence that such was the intention of the parties.[10] If the language is obscure or doubtful, a forfeiture will not be allowed.[11] The provisions should receive no technical construction in aid of forfeitures, for this would be contrary to the spirit of such organizations.[12] On the other hand, instruments providing for forfeitures will be so construed as to avoid them if this can be done without doing violence to the language employed.[13] If possible, the equitable rights of the policy-holder will be preserved.[14] The words of the instrument are to be taken most strongly against the party employing them.[15] The adjudications furnish many illustrations of these principles, which will be seen in the course of this article. A rule of the supreme lodge to the effect that, if any subordinate lodge failed to forward assessments of its members within a prescribed time after such assessments are levied, no benefits should be paid on account of deaths occurring in such defaulting lodge was construed to mean that payment of death benefits should only be suspended during the subordinate lodge's default, hence, a beneficiary of a member of the subordinate lodge was permitted to recover the death benefit where the lodge had been reinstated, although it stood suspended at the date of the member's death.[16]

4. *Declaration of Forfeiture, and Herein, Ipso Facto Regulations.* — Unless expressly provided, mere non-payment of assessments is not of itself sufficient to constitute a forfeiture. Ordinarily, default in payment is only a condition upon which the right to declare a forfeiture exists; hence, it may be stated, as a general rule, that some definite act on the part of the society is required to complete the forfeiture.[17] But this, of course, is to be determined by the construction to be given the regulations of the particular society. Where the society is to act in the matter, the marking of a member's account "suspended," by the secretary, is not sufficient to compass a forfeiture.[18] So, where it is merely made the duty of the local secretary to collect dues and assessments within a specified time after notice, failure to pay does not of itself work a forfeiture.[19] By the regulations of many societies the non-payment within the prescribed time constitutes a suspension *ipso facto*. Under such regulations no definite action on the part of the society is required to complete the forfeiture, for it is effected upon the failure to observe the condition upon which membership was made to depend; that is, the regulation is self-executing.[20] However, as forfeitures are of a penal nature, they are always looked upon with great disfavor, as has already been observed,[21] especially where they are summary in their character and operate to produce a loss of valuable property rights; and hence, an *ipso facto* construction will not be adopted unless such intention is clearly expressed by the most unambiguous and explicit language.[22] Thus, where the provision is that, upon failure to pay the annual contribution within a prescribed time, "the defaulter shall forfeit his membership and his name shall be stricken from the rolls of members," it was properly adjudged that the default was only a ground of forfeiture, in the nature of a judgment *nisi*, to be final by the express vote of the society, and that it was

[10] Payne v. Mut., etc. Society, 17 Abb. N. Cas. (N. Y.) 53; Hull v. N. W., etc. Ins. Co., 39 Wis. 397; Erdman v. Mut. Ins. Co., 44 Wis. 376; May on Ins. § 361.

[11] Franklin Life Ins. Co. v. Wallace, 93 Ind. 7.

[12] Schunck v. Gegenseitiger Wittmen und Waisen Fond, 44 Wis. 369, 372.

[13] Supreme Lodge Knights of Honor v. Abbott (Ind.), 11 Ins. L. J. 907.

[14] Miner v. Michigan, etc. Assn., 63 Mich. 338, 29 N. W. Rep. 838.

[15] Hull v. N. W., etc. Ins. Co., 39 Wis. 397; Symonds v. N. W., etc. Ins. Co., 23 Minn. 491.

[16] Supreme Lodge Knights of Honor v. Abbott (Ind.), 11 Ins. L. J. 907.

[17] Johnson v. Southern Mut. Life Ins. Co., 79 Ky. 403. See McMurry v. Supreme Lodge Knights of Honor, 20 Fed. Rep. 107; 18 Cent. L. J. 372, where the member was behind in the payment of several assessments, but he had never been suspended by any vote of the society recorded in the minutes. The court held that he was not in "good standing," and no vote of the lodge was required to compass the forfeiture. But it will be seen at once that this decision is not sound.

[18] Schue v. Grand Lodge I. F., 17 Fed. Rep. 214.

[19] Payne v. Mut. Relief Assn., 17 Abb. N. C. (N. Y.) 53.

[20] McDonald v. Ross-Lewin, 29 Hun, 87; Borgrafe v. Knights of Honor, 22 Mo. App. 127, 143; Seibert v. Chosen Friends, 29 Mo. App. 268; Ill. Mut. Ben. Society v. Baldwin, 86 Ill. 479; Rood v. Ry. Pass. Assn., 31 Fed. Rep. 62, 64. See also Royal Templars of T. v. Curd, 111 Ill. 284, 14 Ins. L. J. 84; Hogins v. Supreme Council Champions of the Red Cross, 76 Cal. 109, 18 Pac. Rep. 125; Knights of Father Matthews v. Smith, 36 Mo. App. 184.

[21] See § 3, *supra*.

[22] Medical & Surgical Society v. Weatherby, 75 Ala. 248; Mulroy v. Knights of Honor, 28 Mo. App. 463, 468; People v. Medical Society, 32 N. Y. 187.

not to operate as a forfeiture *ipso facto*.[23] But a rule which declares that a defaulter shall cease to be a member, and which also provides that the secretary shall strike his name from the rolls, such rule is self-executing, and although the secretary fails to strike off the delinquent's name, membership is not thereby continued. The provision as to the duty of the secretary is merely directory, and striking off the name is not the act which severs the relation between the member and the society, but it is the failure to pay the assessment within the limited time which terminates the membership.[24] Where a default in the payment of assessments constitutes a ground of forfeiture only, the right to declare it and suspend the member belongs to the society at large, unless by the fundamental articles, or by some provision founded on them, this power is distinctly conferred upon a select number.[25] But it must be remembered that clear and unambiguous language is necessary to constitute a delegation of so large and dangerous a power. It cannot be established by inference or presumption.[26] And it has been said that the power of expulsion cannot in an any case be delegated to a single officer.[27] In similar organizations, sometimes the power of expulsion is delegated to the board of directors,[28] or trustees,[29] or a select committee,[30] but the authority to do so must arise in each case by virtue of the fundamental law of each particular organization.

[23] Medical & Surgical Society v. Weatherby, 75 Ala. 248. See Gray v. Christian Society, 137 Mass. 329.

[24] Rood v. Railway Passenger, etc. Ass'n, 31 Fed. Rep. 62, 64.

[25] Weber v. Zimmerman, 22 Md. 156; Green v. African M. E. Society, 1 Serg. & R. 254; Commonwealth v. Pa. B. Inst., 2 Serg. & R. 141; State v. Chambers of Commerce, 20 Wis. 63, 72; People v. Board of Trade, 45 Ill. 112; People v. Fire Department, 31 Mich. 458; People v. New York, etc. Ass'n, 18 Abb. Pr. 271; White v. Brownell, 2 Daly, 329; Hibernia Fire Engine Co. v. Commonwealth, 93 Pa. St. 264.

[26] Hassler v. Philadelphia M. Ass'n, 14 Phila. 233.

[27] Hibernia Fire Engine Co. v. Commonwealth, 93 Pa. St. 264; People v. Fire Department, 31 Mich. 453. See Lowry v. Stolzer, 7 Phila. 397; Knights of Pythias Case, 3 Brewster (Pa.) 452.

[28] Jones v. National, etc. Ass'n (Ky.), 2 S. W. Rep. 447; State v. Chambers of Commerce, 47 Wis. 670; Pitcher v. Board of Trade, 121 Ill. 412; 13 N. E. Rep. 187; Manning v. San Antonio Club, 63 Tex. 166; 51 Am. Rep. 639.

[29] Murdock v. Phillips' Academy, 12 Pick. 244.

[30] Hutchinson v. Lawrence, 67 How. Pr. 38; Hussy v. Gallagher, 61 Ga. 86, 92; Lambert v. Addison, 46 L. T. Rep. (N. S.) 20; Lyttelton v. Blackburn, 33 L. T Rep. (N. S.) 641.

[31] Massachusetts Stat. 1880, ch. 196, § 3.

[32] Rosenberger v. Washington, etc. Co., 87 Pa. St. 207, 213.

[33] Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329; American Ins. Co. v. Schmidt, 19 Iowa, 502. As to when the court may compel a levy, see *In re* Protection Life Co., 9 Biss. 188.

[34] Schlimpf v. Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373. But see § 13, *post*.

[35] Williams v. German Mut., etc. Co., 68 Ill. 387.

[36] Susquehanna Mut. Ins. Co. v. Tunkhannock Toy Co., 97 Pa. St. 424.

[37] Bay State Mut. etc. Co. v. Sawyer, 12 Cush. 64; Fayette Mut. etc. Co. v. Granville, 8 Allen, 27.

[38] Monmouth Mut. etc. Co. v. Lowell, 57 Me. 504.

[39] Farmers' Mut. etc. Co. v. Chase, 56 N. H. 340. See Gillis v. Bailey, 21 N. H. 162; 2 Kent Com. 633; Ang. & Ames on Corp. 277; Story on Agency, § 13.

[40] Atlantic Mut. etc. Co. v. Sanders, 36 N. H. 254.

*5. Assessments—Necessity for Making Must Exist.*—It is a rule, which admits of no exception, that assessments must be legal before a member can be suspended or expelled for refusal or neglect to pay them within the specified time. Ordinarily, the method of making assessments, as well as the amounts thereof, are particularly enumerated by the charter, constitution or rules of the given organization. Sometimes the statutes of the State under which the association is organized prescribes the method.[31] Assessments cannot be made before the necessity therefor exists;[32] but, on the other hand, to authorize the making of them a loss must have actually occurred.[33] It has been held that an assessment may be legally made after a general assignment by the company for the benefit of creditors.[34]

*6. Assessments—Who Empowered to Make.*—Ordinarily the directors are empowered to make the assessment, and it is not necessary that they should all be present when it is made, provided they have been duly notified,[35] and a quorum is present,[36] and it is made at a regular meeting.[37] The directors cannot delegate their authority to make assessments to a minority of their body.[38] This is in accordance with the general rule that where the power to be executed necessarily involves the exercise of judgment and discretion, it cannot be delegated. The maxim is *delegatus, non protest delegare*.[39] But where no exercise of discretion is required on the part of the directors, as where it is merely a matter of arithmetical calculation, the authority to make the assessment may be delegated.[40] In one case the directors received

notice of the death, but not the requisite proofs. They passed a resolution to the effect that when the proof of death should arrive and be approved by the chairman (who possessed such power), the secretary should make the assessment and send out the notices. The assessment thus made was adjudged valid.[41]

7. *Assessments—Method of Making.*—It is indispensable that the assessment be made in substantial accordance with the method specified.[42] Generally the officers making it have no discretion in the matter.[43] They cannot overlook the plain provisions of the company's charter or rules in search of a principle more purely equitable.[44] However, an assessment will not be declared illegal if it proceeds upon correct principles and is substantially correct, although some slight errors or irregularities may appear.[45] So, where the rules require the assessment to be accompanied by a statement showing the expenditures, such as losses paid, expenses, etc., such statement need not descend into details, but it is legal if it is sufficiently clear, to show the necessity of the assessment.[46] But where the law requires that an order for an assessment should be signed by certain officers, an unsigned order is invalid.[47] And an assessment made in accordance with the custom of the order, but not in accordance with its constitution, is illegal, where it does not appear that the member had knowledge of such custom.[48] So, where the rule requires assessments to be made by classes—each class being separate and distinct and liable for its own assessments — an assessment ignoring a separation into classes, both as to members and losses, is invalid.[49]

[41] Passenger Conductors, etc. Co. v. Birnham, 116 Pa. St. 565; 11 Atl. Rep. 378; 10 Cent. Rep. 63.

[42] Agnew v. A. O. U. W., 17 Mo. App. 254; 15 Ins. L. J. 232; Susquehanna, etc. Co. v. Gackenbach, 115 Pa. St. 492; 9 Atl. Rep. 90; York County, etc. Ass'n v. Myers, 11 W. N. C. 541; Sands v. Hill, 42 Barb. 651; 1 Am. & Eng. Corp. Cas. 191; Columbia Ins. Co. v. Kinyon, 37 N. J. L. 33; Baker v. Citizens' Mut. Ins. Co.. 51 Mich. 243; 1 Am. & Eng. Corp. Cas. 189.

[43] Thomas v. Whallon, 31 Barb. 172.

[44] Slater, etc. Co. v. Barstow, 8 R. I. 343.

[45] Marblehead, etc. Co. v. Underwood, 3 Gray, 210, 214; Passenger Conductors' Life Ins. Co. v. Birnham, 116 Pa. St. 565; 11 Atl. Rep. 378; 10 Cent. Rep. 63.

[46] Lycoming Ins. Co. v. Bixby (Pa.), 15 W. N. C. 109.

[47] Baker v. Citizens', etc. Co., 51 Mich. 243: 1 Am. & Eng. Corp. Cas. 189.

[48] Underwood v. Iowa Legion of Honor, 66 Iowa, 134; 14 Ir. L. J. 628.

[49] Atlantic Mut. Ins. Co. v. Mooly, 74 Me. 385.

8. *Assessments—Amount.*—The assessment must be limited to the objects declared in the charter or fundamental laws of the organization. Sometimes, under the laws of some associations, the managers may exercise a reasonable discretion in fixing the amount to to be raised, having in view the losses and practical workings of the organization, but if these reasonable limits are transcended the assessment is illegal.[50] Simple excess arising from error of judgment, where it appears that the managers acted honestly and prudently, will not vitiate the assessment.[51] But a resolution leaving the amount of the assessment blank is not a legal levy.[52] Where the money is already drawn against, reducing the amount below the sum that the order is required to keep as a benefit fund, a new assessment is authorized; the officers need not wait until the money is actually taken out.[53]

9. *Assessments — Against Whom may be Made.*—Where the rule is that "no member shall be assessed for a death that occurred prior to the date of his benefit certificate," an assessment on a death which occurred prior to the date of a member's certificate is void as to him,[54] but is valid as to those who were members at the time of the loss.[55] A rule charging all members with assessments who take the final degree "on and prior to" a certain date, makes them liable to contribute to all deaths occurring during that calendar day.[56] An assessment made by an organization incorporated under the laws of a foreign State, but not subject to the jurisdiction of the State in which the subordinate lodge, whose members are assessed, is located, is invalid, and members cannot be legally suspended for a refusal to pay the same.[57]

[50] Jones v. Sisson, 6 Gray, 288; People's Equitable, etc. Co. v. Babbitt, 7 Allen, 235; Traders', etc. Co. v. Stone, 9 Allen, 483.

[51] Rosenberger v. Washington, etc. Co., 87 Pa. St. 207, 213. See Crossman v. Massachusetts B. Ass'n, 143 Mass. 35; 9 N. E. Rep. 753.

[52] St. Lawrence Mut. Ins. Co. v. Paige, 1 Hilton (N. Y.), 430.

[53] Eaton v. Supreme Lodge Knights of Honor (U. S. C. C.), 22 Cent. L. J. 560.

[54] Rowswell v. Equitable Aid Union, 13 Fed. Rep. 840; 12 Ins. L. J. 695. See Farmers' Mut. etc. Co. v. Chase, 56 N. H. 341.

[55] Long Pond Mut. etc. Co. v. Houghton, 6 Gray, 77, 82.

[56] Eaton v. Supreme Lodge Knights of Honor, 22 Cent. L. J. 560, and note.

[57] Lamphere v. A. O. U. W., 47 Mich. 429; 11 N. W.

10. *Assessments—How their Legality to be Shown.*—Where the non-payment of an assessment is relied upon as a forfeiture, the society must affirmatively show that the assessment was made in the manner pointed out in the charter. These facts must be pleaded. An allegation that the assessment was "duly" made, in accordance with the society's charter, is not sufficient, it being but an averment of a conclusion of law.[58] The levy of the assessment is a ministerial, not a judicial act, and therefore no presumption can arise in favor of its legality. The promise of the assured to pay the assessments rests upon certain conditions, and such conditions must be shown to exist before any liability is incurred.[59]

11. *Notice of Assessments Indispensable.*—In the case of ordinary life policies the company is under no obligation to give the assured notice of the amount and maturity of the premiums accruing on the policy, because that instrument fixes definitely the amount of the premium and the time of its payment, and the assured is bound to know these facts.[60] And it has been held that, although these companies are accustomed to give such notice, an omission in this respect would not constitute an excuse for non-payment.[61] However, it has also been held that where such custom prevails and the company does nothing to apprise the policy-holder of a change or an abandonment of the custom, its conduct will raise a reasonable expectation that such notice will be given, and the assured may rely upon it in case of any particular premium.[62] A promise to give notice is not binding on the company where the policy provides for none, for the written contract prevails over the oral, and everything is merged in the writing.[63] But with reference to the organizations under consideration, the amount and frequency of the assessments being dependent upon the mortality of the members, the certificate holders cannot know of them in advance. Until notice of an assessment is sent no liability is imposed on the certificate holder to pay it.[64] Where notice of assessment is withheld from any lodge and its members, it is not an assessment on that lodge and its members, and their "good standing" is not lost by paying an assessment of which they had no notice, resulting from the fault or misconduct of the supreme lodge or its officers.[65]

12. *Notice of Assessments—Sufficiency.*—The law requires that the notice, to be binding, be sufficient.[66] It must be given by the proper authority.[67] Where the law of the society requires the notice to be given by the general secretary, a notice issued in his name, to which his signature is appended in print, filled up and addressed by the local secretary, is not sufficient. A notice to do an act which is required to be given by a particular person named, contemplates the personal action and judgment of such person, and involves the exercise of power and discretion to be exercised by the individual himself, which cannot be delegated to another.[68] It seems hardly necessary to state that the notice should be sent to the party liable for the assessment. Where three members of one family are certificate holders in the same association, three notices inclosed

Rep. 268; Allnutt v. Subsidiary High Court, 62 Mich. 110; State *ex rel.* v. Miller, 66 Iowa, 67; Grand Lodge, etc. v. Stepp, 14 Pittsb. Leg. J. 164.

[58] American Mut. Aid Society v. Helburn, 85 Ky. 1; 2 S. W. Rep. 495.

[59] Thomas v. Whallon, 31 Barb. 178; Pacific Mut. Ins. Co. v. Guse, 49 Mo. 332; Home Ins. Co. v. Shidder, 36 Ind. 430; Atlantic Mut., etc. Co. v. Fitzpatrick, 2 Gray, 279.

[60] Thompson v. Ins. Co., 104 U. S. 252; Mutual Fire Ins. Co. v. Miller Lodge, etc., 58 Md. 463.

[61] Thompson v. Ins. Co., 104 U. S. 252, distinguishing Insurance Co. v. Eggleston, 96 U. S. 572; Mandego v. Centennial Mut. Life Ass'n, 64 Iowa, 134; distinguishing Phœnix Mut. Life Ins. Co. v. Doster, 106 U. S. 30; Insurance Co. v. Mowry, 96 U. S. 544.

[62] Mayer v. Mut. Life Ins. Co., 38 Iowa, 304; Johns v. Insurance Co. (Pa.), 2 W. N. C. 243; Girard Life Ins. Co. v. Mut. Life Ins. Co., 2 W. N. C. 320; Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156; Girard Life Ins. Co. v. Mut. Life Ins. Co., 86 Pa. St. 236.

[63] Insurance Co. v. Mowry, 96 U. S. 544; 2 Wood C. C. 663.

[64] Hall v. Supreme Lodge Lodge Knights of Honor, 24 Fed. Rep. 450, 455; Covenant, etc. Ass'n v. Spies, 114 Ill. 463; Mut. Relief Ass'n v. Billan, 3 Am. Law Rec, 546; Mutual, etc. Ass'n v. Essender, 59 Md. 463; 28 Alb. L. J. 80; Farrie v. Supreme Council, etc., 15 N. Y. State Rep. 155; Gellatly v. Odd Fellows, etc., 27 Minn. 215; 6 N. W. Rep. 627; Coyle v. Kentucky Grangers', etc. Society (Ky.), 2 S. W. Rep. 676; Castner v. Farmers' Ins. Co., 50 Mich. 273; 15 N. W. Rep. 452; Bates v. Mut. Ben. Ass'n, 47 Mich. 646; Mulroy v. Knights of Honor, 28 App. 463; People v. Theatrical M. Ass'n, 8 N. Y. St. 675.

[65] Hall v. Supreme Lodge Knights of Honor, 24 Fed. Rep. 450, 455.

[66] Mutual, etc. Ass'n v. Essender, 59 Md. 463; 28 Alb. L. J. 80.

[67] Bates v. Detroit, etc. Society, 51 Mich. 587; 1 Am. & Eng. Corp. Cas. 186.

[68] Payn v. Mut. Relief Soc., 17 Abb. N. Cas. (N. Y.) 53.

and mailed in one envelope does not constitute a sufficient notice to one who had never received or had knowledge of it.[69] Where a husband procures insurance for the benefit of his wife and children, he is an agent for them for the purpose of receiving notices of assessments and premiums.[70] To be sufficient the notice must be given within the proper time. It is not good if given prior to making the assessment.[71] The notice must be sufficient in form, where a form is prescribed. However, a substantial compliance in this respect is all that is required. Thus, a notice fairly notifying the member that, unless payment of the assessment is made on a day designated, the policy will be forfeited, is sufficient, although the words of the statute are not followed.[72] Where no particular form is prescribed, the sufficiency of the notice is sometimes a question for the jury.[73] Where the by-law requires the notice to include a list of all deaths subsequent to the last assessment, and to specify the amount due from the members to the benefit fund, a notice omitting such information is insufficient, and its service raises no liability on the part of the members to pay the assessment demanded.[74] The court observed: "There was something of substance in the part omitted from the notice. In the case of the absence or loss of the certificate the notice would furnish him (the member) with the only information of the amount he was called upon to pay; and the member was entitled to know the number of deaths since the last assessment, for by this information alone could he form any opinion as to the honest administration of the company's affairs, or as to the care exercised in the selection of lives and members." There are many cases where a person must, at his peril, act upon the knowledge of a particular fact, however derived, or upon such information as should reasonably put him on inquiry. But when the special law of the notice prescribes the form and manner in which it is to be given, especially where a forfeiture may result, the party to be affected will, as a general rule, not be bound by a notice given in any other form or manner.[75] Although the society provides a particular form of notice of assessments, such requirement may be waived.[76] The notice must be served in the manner designated, unless the manner of service is waived by the member.[77] Notice by publication is sometimes provided,[78] but where the law requires publication to be made in three newspapers, publication in only two is not sufficient.[79] So personal notice is not sufficient where the law requires a publication.[80] In one case the charter provided for notice by posting. The society had adopted the practice of sending notice to a particular class by mail. Upon a particular occasion it failed to mail a notice. It appeared that the failure to pay the assessment within the prescribed time was due solely to the want of notice. It also appeared that as soon as the member received information of the levy of the assessment he tendered payment. The company was held to be estopped from claiming the forfeiture.[81] Notice by mail, directed to the last post-office address of the member, is a legal notice, where the society's rules so provide, and the fact that the notice is not received is immaterial.[82] But where the charter provides that the member shall be "notified by the secretary or otherwise, either by circular or a verbal notice,"[83] or where the manner of sending the notice is not prescribed,[84] the notice

[69] Garretson v. Equitable Mut., etc. Ass'n (Iowa), 38 N. W. Rep. 127.

[70] Whitehead v. New York Life Ins. Co., 102 N. Y. 143; reversing 33 Hun, 425; Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156.

[71] Bangs v. McIntosh, 23 Barb. (N. Y.) 591; Fitzpatrick v. Mutual, etc. Ass'n., 25 La. Ann. 443.

[72] Phelan v. N. W., etc. Co., 42 Hun, 419.

[73] Jones v. Sisson, 6 Gray, 288, 297; Buckley v. Columbia Ins. Co., 83 Pa. St. 298.

[74] Miner v. Michigan Mut. B. Ass'n, 63 Mich. 338; 29 N. W. Rep. 852.

[75] Seibert v. Chosen Friends, 23 Mo. App. 268.

[76] Hefferman v. Supreme Council A. L. of H. 40 Mo. App. 605.

[77] Hillister v. Quincy Ins. Co., 118 Mass. 478, 481.

[78] New York, etc. Co. v. Knight, 48 Me. 75; Westmore v. Mut. Aid, etc. Ass'n, 23 La. Ann. 770; Fitzpatrick v. Mutual, etc. Ass'n, 25 La. Ann. 443.

[79] Sands v. Graves, 58 N. Y. 94.

[80] Northampton, etc. Co. v. Stewart, 39 N. J. L. 486.

[81] Gunther v. N. O., etc. Ass'n, 5 South. Rep. 65; 18 Ins. L. J. 122.

[82] Union Mut. Accident Ass'n v. Miller, 26 Ill. App. 230; Yoe v. Howard, etc. Ass'n, 63 Md. 86; 6 Am. & Eng. Corp. Cas. 641; Borgraefe v. Knights of Honor, 22 Mo. App. 127, 141; Epstein v. Mut. Aid, etc. Ass'n, 28 La. Ann. 938; Weakly v. N. W., etc. Ass'n, 19 Ill. App. 327; Greeley v. Iowa, State Ins. Co., 50 Iowa, 86, 91; Lathrop v. Greenfield, etc. Co., 2 Allen, 82, 85; Covenant Mut. Ben. Ass'n v. Spies, 114 Ill. 463; May on Ins. § 562. See Stewart v. Sup. Council Am. L. of H., 36 Mo. App. 319.

[83] Castner v. Farmers' Mut. Co., 50 Mich. 273. See Burnham v. Corey, 17 Mich. 282.

[84] McCorkle v. Texas Ben. Ass'n, 71 Tex. 149, 8 S. W. Rep, 516.

will not be sufficient unless it is actually received. Proof of service of notice is also necessary. Where a notice sent by mail is legal, competent evidence of mailing it, properly addressed, is all that is required, without showing its actual receipt,[85] but in the absence of such provision, its actual receipt by the member must be shown.[86] Proof of service also involves proof of contents.[87] It seems hardly necessary to remark that the burden of proving notice is on the company or society where a forfeiture is claimed.[88] Where the law requires "legal notice" to be given, facts showing this must be given, where the defense of forfeiture is interposed. Hence, a mere averment that legal notice had been given is not sufficient.[89]

13. *Excuses for Non-payment of Assessments.*— Certain circumstances may sometrmes exist which will relieve the member from paying assessments when they mature;[90] as where a company ceases to do business, or becomes insolvent and a receiver is appointed.[91] However, members are liable for assessments to pay losses which occurred during the time when they were such, although the insolvency of the company has been decreed.[92] But after a member has withdrawn from the association, having previously paid his proportion of all existing losses of all assessments then levied, losses subsequently sustained, arising from failure to collect, or from any other cause, are not existing losses, and the member is not liable to assessments to cover such losses.[93] So, where a foreign company has ceased to do business in the State and place indicated in the policy, as that where the premium shall be paid, and has no known legally constituted agent there, this will excuse the prompt payment of premiums;[94] but where the law of the State does not require a company upon taking out policies in a State to keep an agency within that State, although it had one and withdrew him and gave full notice to its members, this does not relieve prompt payment.[95] A company has no right to turn its policy-holders over to another company against their consent, and such policy-holders need not protest against an effort to do so, to protect their legal rights; in such case they are excused from paying premiums.[96] A mere failure of the company to perform some of the obligations of the contract which go to a part only of the consideration, where the breach may be paid for in damages, is not sufficient to excuse prompt payment.[97] Where the company has violated its charter, and as a result of such unlawful acts had then become insolvent, and it had become unsafe for the assured to continue to pay premiums, such facts do not show a sufficient excuse for a refusal, while the company continues to do its ordinary business in the usual way and was ready to receive premiums.[98] The company's agents may sometimes mislead policy-holders to such an extent that they will be excused from paying promptly. Thus, where a policy-holder is misled as to the day of payment by information derived from a duly authorized agent, whereby the premium was not tendered until after the day it fell due, the policy cannot be forfeited.[99] In one case, a foreign company's agent had delivered the policy and collected two premiums when he

[85] See cases in note 82.

[86] Odd Fellows, etc. v. Hook, 10 W. L. Bull. (Ohio) 391; McCorkle v. Texas Ben. Ass'n, 71 Tex. 149; 8 S. W. Rep. 516; Castner v. Farmers' Mut. Ins. Co., 50 Mich. 273.

[87] Supreme Lodge, etc. v. Johnson, 78 Ind. 110, 115; 11 Ins. L. J. 251.

[88] Baxter v. Brooklyn Life Ins. Co., 44 Hun, 184.

[89] Coyle v. Kentucky Grangers', etc. Society (Ky.), 2 S. W. Rep. 676.

[90] People v. Empire Mut. L. Ins. Co., 92 N. Y. 105, 109; Shaw v. Republic L. Ins. Co., 69 N. Y. 286, 293; Bogardus v. N. Y. L. Ins. Co., 101 N. Y. 328, 336; Bacon on Ben. Soc., § 355.

[91] Attorney-General v. Continental L. Ins. Co., 33 Hun, 138; Attorney-General v. Guardians' Mut. Ins. Co., 82 N. Y. 336; Jones v. Life Ass'n of America, 7 Ky. Law Rep. 1; 2 S. W. Rep. 447; People v. Empire Ins. Co., 92 N. Y. 105.

[92] Vanatta v. N. J. Mut. Life Ins. Co., 31 N. J. Eq. 15; Commonwealth v. Massachusetts Fire Ins. Co., 112 Mass. 116; 119 Mass. 45; Alliance Ins. Co. v. Swift, 10 Cush. 433; Marblehead Ins. Co. v. Underwood, 3 Gray, 210: Fayette Ins. Co. v. Fuller, 8 Allen, 27. But see Society Life In . Co. v. Am. Co., 11 Hun, 96.

[93] Union Mut. Fire Ins. Co. v. Spaulding, 61 Mich. 77; 27 N. W. Rep. 860.

[94] Dorwin v. Positive Government Life, etc. Co., 23 L. C. J. 261.

[95] Quinn v. Manhattan Life Ins. Co., 28 La. Ann. 135.

[96] People v. Empire Life Ins. Co., 92 N. Y. 105; Shaw v. Republic Life Ins. Co., 69 N. Y. 286; People v. Security Life Ins. Co., 78 N. Y. 114; 34 Am. Rep. 522.

[97] Bogardus v. New York Life Ins. Co., 101 N. Y. 328, 336.

[98] Taylor v. Charter Oak Life Ins. Co., 9 Daly (N. Y.), 489, 499; 59 How. Pr. 468; 8 Abb. N. C. 331.

[99] Selvager v. John Hancock Mut. Life Ins. Co., 12 Fed. Rep. 603.

ceased to be agent, of which the policyholder had no knowledge. There was no place of payment named in the policy. The premium was not paid when it fell due. This was held excused.[100] But the death of the local agent is no excuse where the premiums are payable at the home office.[101] So, failure of the company to place receipts for premiums in the hands of the local agent does not excuse payment where, by contract, payment is to be made at the principal office, although it had not been the habit of the assured to pay to the local agent.[102] But where the company changes agents who are authorized to receive premiums, and the assured is unable to find the new agent after reasonable inquiry, this excuses prompt payment.[103] Where a forfeiture has been wrongfully declared, and an offer to pay assessments or premiums accruing subsequently is refused, the assured loses nothing by omitting a formal tender of them as they accrue, as long as the company or association insists on the forfeiture.[104] So, where after the premium falls due, an offer is made to pay it to the duly authorized agent, who refuses to accept it on the ground that he has not received the proper receipts from the home office, this constitutes a legal excuse.[105]

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[100] O'Reilly v. Guardian Mut. Life Ins. Co., 1 Hun, 460.

[101] Bulger v. Washington Life Ins. Co., 63 Ga. 328, 331.

[102] Morey v. New York Life Ins. Co., 2 Wood, 263.

[103] Seamans v. N. W. Mut. Life Ins. Co., 3 Fed. Rep. 325. See Insurance Co. v. Wolff, 96 U. S. 326; Insurance Co. v. Pierce, 75 Ill. 426; Thompson v. Insurance Co., 52 Mo. 469; Mayer v. Insurance Co., 38 Iowa, 304; Insurance Co. v. Namer, 80 Ill. 410; Insurance Co. v. Robertson, 59 Ill. 123; Hanley v. Life Association of America, 69 Mo. 380, 383; Pelkington v. Nat. Ins. Co., 55 Mo. 173; Illinois Fire Ins. Co. v. Stanton, 51 Ill. 354; Bonton v. Am. Mut. Life Ins. Co., 25 Conn. 542; White v. Conn. Ins. Co., 120 Mass. 330.

[104] Girard Life Ins. Co. v. Mut. Life Ins. Co., 86 Pa. St. 236; Hayner v. Am. Popular Life Ins. Co., 69 N. Y. 435; Meyer v. Knickerbocker, 73 N. Y. 516.

[105] Kantrener v. Pa. Mut. Life Ins. Co., 5 Mo. App. 581; Shear v. Phœnix Mut. Life Ins. Co., 4 Hun, 800.

## RELEASE AND DISCHARGE—JUDGMENT.

### WHITTEMORE V. JUDD LINSEED & SPERM OIL CO.

*Court of Appeals of New York, Second Division, April 14, 1891.*

1. Where, in an action against two defendants, para. judgments were rendered against each defendant, a release of one defendant, made with the consent of the other, does not release such other defendant where the release expressly provides that he shall not be released.

2. An assignment of the judgment against one defendant gives the assignee no power to release the other defendant.

BROWN, J.: The appellant claims that Hubbell's discharge from the judgment was accomplished in two ways: *First*, by the release executed by the defendant Lord, and delivered to him on August 8, 1874; *second*, by the release of Taylor by the oil company by the instrument of January 5, 1874. The first ground is the one upon which relief is based in the complaint. The second is not there mentioned, or made the basis of the judgment asked for. While I have grave doubt whether the second claim is available to the appellant under his complaint, or whether the question was raised at the trial by any proper and sufficient request to the court thereon, as the facts upon which the claim is now made appear in the findings of the court, the point is considered as if it was properly before us. The second ground upon which the discharge is claimed will be considered first. The strict common-law rule is that if two persons be bound jointly and severally in an obligation, and the obligee voluntarily and unconditionally releases one of them, both are discharged, and either may plead the release in bar. But the legal operation of a release of one of two or more joint debtors may be restrained by an express provision in the instrument that it shall not operate as to the other. This question was recently considered in this court in the case of Hood v. Hayward, 124 N. Y. 1, 26 N. E. Rep. 331. In that case one surety upon a non-resident executor's bond was released and discharged by the devisees and legatees under the will, and the appellant's contention was that by virtue of that release to his co-surety he also was released. That contention was overruled, and it was held that he was not discharged; and the decision rested upon an express provision in the release that it should not be construed as in any way affecting any claim or demand which the releasors had or might have against the non-resident executor, or against the appellant as surety on his bond. In addition to the authorites cited by Judge Potter in support of that opinion, I refer to the following: 1 Pars. Cont. (5th ed.) p. 29: Kirby v. Taylor, 6 Johns. Ch. 246, Hopk. Ch. 309-334; Rogers v. Hosack's Ex'rs, 18 Wend. 319, 25 Wend. 313, (see opinion of Cowen, J.:) Solly v. Forbes, 2 Brod. & B. 38; North v. Wakefield, 13 Q. B. 536; Burke v. Noble, 48 Pa. St. 168; Yates v. Donaldson, 5 Md. 389; Edwards v. Varick, 5 Denio, 665-690; Lysaght v. Philips, 5 Duer, 106-116. The rule deducible from all the authorities is that equity always gives to a release operation according to the intention of the parties and the justice of the case, and although many early cases may be cited to the effect that the rule applied by courts of law was otherwise, and that a saving clause repugnant to

the nature of the grant was void, and that the grant remained absolute and unqualified, such is not the modern rule of construction. The equitable rule now prevails, and a release is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation. Testing the release in this case by the clear and manifest intention of the parties and the occasions of giving it, its operation will be confined to Taylor, and it in no way tended to release or discharge Hubbell. By the terms of the contract Hubbell was to remain liable, and under all the authorities the release of Taylor operated to discharge him alone. But the two papers appear to have been delivered by Hubbell's attorney on August 8, 1874, and for the purpose of this appeal we must assume their delivery to have been Hubbell's act. The purpose of their execution and delivery is shown by the tripartite agreement executed by and between the surviving assignees and Taylor and Hubbell. This agreement looked to the settlement of the several estates and the discharge of the assignees, and to accomplish that object Hubbell professed to have procured or to be able to procure releases to said assignees from all outstanding creditors of the joint estate and from his individual estate except four, one of whom was the oil company, and it was therein expressly stated that the four excepted claims were to remain outstanding. Such agreement between them provided that a certain claim against the United States arising out of the destruction of a ship by the Confederate cruiser Alabama was not a part of the joint estate assigned, but belonging to Taylor and Hubbell individually; and other claims, with the consent of Taylor, were to be assigned to Hubbell, to enable him to procure releases from creditors of the joint estate. Pursuant to this agreement the two releases in question were delivered by Hubbell, and he must be held to be bound by the express stipulation that the oil company's claim was to remain outstanding against him, and that, so far as the release to Taylor was concerned, it expressly limited its operation to Taylor, and was intended to discharge him alone. In other words, he must be deemed to have consented to the latter provision. In Rogers v. Hosack's Ex'rs, 18 Wend. 336, Judge Cowen said, in speaking of the rule that the release of one of two joint debtors operates to discharge both, "the rule has generally if not universally, been applied to cases where such co-debtors were released without the consent of the other. * * * The release is like the leaving off of the seal from a bond which subverts the whole contract. * * * But the case is different when the alteration is by the consent of all parties, accompanied with an intention that those only should be discharged whose names or seals are torn off in the case supposed, or who are released as in the case at bar." After discussing the facts of the case before him, he reaches the conclusion that the debtor who claimed the benefit of the strict rule intended to remain liable, and said: "Upon principle there is nothing to prevent such an agreement." To the same effect is Burson v. Kincaid, 3 Pen. & W. 57. Upon the assumption, therefore, that the judgment against Taylor and Hubbell was joint, our conclusion is that Hubbell was not discharged by the release of January, 1874.

But the conclusive fact in this connection is that no joint judgment ever was entered against Taylor and Hubbell. The whole of the appellant's argument is built upon the assumption that such a judgment existed, and his effort has been to convince us that, although the judgment was not joint in form, yet it must and should be so treated by the court on this appeal. Having exhausted all the remedies possible in an ineffective effort to correct the judgment and make it joint, he asks this court to so regard it, for the purpose of enabling him to invoke the aid of a harsh and technical rule of law, to discharge him from an obligation towards the payment of which it does not appear that he has ever contributed a cent. To do so would manifestly subvert and overthrow the intention of the parties in their various complicated dealings had in the settlement of several estates. They had a right to contract upon the faith of the record as it stood, and it is not unreasonable to assume that, if the judgment had been joint in form, the result sought would have been reached in another way, and the case not embarrassed with the questions that have arisen upon the several assignments and releases that have been executed. The fact that is prominent all through the negotiations is that the oil company never intended to release its claim against Hubbell, and Hubbell was well aware of that fact.

The other ground for the judgment sought rests wholly upon the question whether Mr. Lord had authority to execute and deliver the release given to Hubbell. The trial court found that such instrument was executed without any power or authority, and, as to the oil company's claim, was wholly inoperative and void. It may be conceded that the assignment of October 6, 1874, was intended to relate back to and have effect as of a date prior to the execution of the release. By the terms of the instrument of August, 1872, the oil company assigned only its claim against Taylor individually and against his individual estate in the hands of the assignee. By the instrument of October, 1874, it assigned its claim against the joint property of Taylor and Hubbell. In both it expressly reserved its claim against Hubbell individually. This was in entire harmony with the tripartite agreement, which recited the fact that the assignees had never realized anything from Hubbell's individual estate, and which contemplated the discharge of the assignees by the creditors, but that the oil company should retain its claim against Hubbell. The legal conclusion which the appellant asked the court to draw from the two assignments was that they were ineffectual to divide the claim, and carried to the assignee the right to collect the whole judgment; that is, that, although the assignor intended to sell, and

the assignee to buy, but a part or share of the claim, and clearly expressed such intent in the deed of assignment, the law gives to the instrument an entirely different effect, and transfers what neither intended should pass by it. I know of no principle of law that works such a result, and no authority is cited to sustain it. The authorities that are cited hold simply that a creditor cannot split up a single cause of action without the consent of the debtor. The reason for this rule is that to permit a cause of action to be divided would subject the debtor to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any assignment by which it may be broken into fragments. Mandeville v. Welch, 5 Wheat. 277. But the rule goes only to the right to sue as assignee of a part of a single cause of action. It does not deny the right to sell and transfer an undivided part of a demand; and if all the owners unite in a suit upon it the fact of the assignment of a part constitutes no defense.

We need not consider in this case what title or authority Mr. Lord acquired under the assignment to him, or what would have been the effect on the claim if Taylor or the assignee had paid it in full to Lord. No such question arises. The only pertinent inquiry is, did Lord, under the assignment of the demand against Taylor, acquire power to release Hubbell? That inquiry was properly answered at the trial, and there was no error in the refusal to find the request I have quoted. If the assignment was ineffectual to divide the claim, the title remained in the oil company; but as the judgments were several, and not joint, and no question of payment of either debtor arises, it is not perceived why the judgment against Taylor could not be separately assigned. No one was prejudiced by such a transaction, and the rights of the debtors between themselves remain unimpaired and unaffected. The claim that Mr. Lord incurred some liability to Hubbell in case the release was ineffectual to discharge him, is not available on this appeal. No motion was made to amend the complaint except in respect to the demand for judgment. The claim against Lord could not stand upon the allegation of the complaint, and the court properly denied the motion to amend. The judgment should be affirmed. All concur, except Parker, J., not sitting.

NOTE.—The rule is that the release of the liability of one or more joint or joint and several obligors, or one or more joint tort-feasors, discharges the liability of the other whether it is sought to establish it in a court of law or in a court of equity, Hood v. Hayward, 124 N. Y. 1. But the release must be free from restrictions or valid limitations. The only question raised is as to whether the instrument is a technical and unqualified discharge of the obligation without reservation. If it is not and no positive rule or principle of law forbids, the court will give the precise effect to the instrument intended by the parties to it. This doctrine is supported by Ellis v. Esson, 50 Wis. 138; Kirby v. Taylor, 6 Johns. Ch. 246; Benedict v. Rea., 35 Hun, 34; Irvine v. Millbank, 56 N. Y. 635; Morgan v. Smith, 70 N. Y. 537; Price v. Barker, 4 Ellis and Black, 770; Bronson v. Fitzhugh, 1 Hill, 185; Matthews v. Chicopee Manufacturing Company, 3 Rob. 711. But the rule is equally well settled that a release of one joint debtor without reservation will release all. In Trotter v. Strong, 63 Ill. 272, a joint judgment was obtained against the principals and sureties on a note and the creditor agreed with one of the principals to discharge him from the judgment if he would give security for the payment of about one-fourth of the amount thereof. It was held that the sureties were thereby discharged. Brown v. Ayer, 24 Ga. 288. Judge Potter says. "The contractual relation between co-sureties is that each shall pay one-half of the amount of the liability assumed. There is no other contractual relation between them, certainly none that entitles one surety to share in the voluntary benefits or presents that the obligee may make the other surety. The great number of decisions and the discussions in the opinions of the courts upon this branch of the law has arisen as it seems to me, not from any doubt or diversity of opinion in relation to the effect of an instrument under seal clearly expressing a discharge of one joint obligor in consideration of a sum less than the entire obligation or liability and a reservation of the remainder of the liability against the other obligor, but from a construction of the nature and effect of the various agreements and transactions between one or more joint obligors with the obligee, whether the agreement or transaction shall be held as a full satisfaction of the obligation as to all the obligors, or a satisfaction in part and a release of less than all the obligors, or a covenant not to sue one or more of them."

As to whether a judgment should be joint or several where there are two or more defendants depends upon the facts in each case. If the items of damage are distinct a joint judgment will not be entered unless each defendant is liable to the full extent of the verdict. Chambers v. Upton, 34 Fed. Rep. 173. Then if the contract sued upon is joint and several a several judgment is proper, for the defendants could have been sued alone. Sears v. McGrew, 10 Oreg. 48; see 83 Pa. St. 193. But where the obligation on which the action is brought is joint and the several defendants plead and defend together it will be error to render several judgments against them for several damages. Rochester v. Anderson, 1 Biff. 439; Howell v. Barrett, 4 Gilm. 433; Holmes v. Gay, 6 Bush, 47; Starry v. Johnson, 32 Ind. 438. In Judd Linseed Oil Company v. Hubbell, 76 N. Y. 543, it was held that if in an action on a partnership obligation separate judgments are entered against each of the partners instead of a joint judgment against all, it might be corrected on motion within the statutory time. It was held in Geyner v. Warfield, 72 Ia. 436; that the release of a lien on land owned by joint judgment debtors after the transfer by one debtor of his interest in the land did not affect the plaintiff's right to proceed against the defendants personally for the collection of the judgment. Geyner v. Howell, 33 N. W. Rep. 240.

But these judgments are themselves several obligations as well as joint, and, therefore, an action can be maintained upon them against either of the judgment debtors separately and they can in like manner be used as a set-off against either. Read v. Jeffreys, 16 Kan. 534. See also Stout v. Baker, 32 Kan. 141.

There are numerous decisions to the effect that a judgment rendered against two or more defendants ointly is not susceptible of division or apportionment

so as to be purged of the error of irregularity it may contain as to one and stand good as to the others. They hold that a judgment is an entirety, and therefore if it is void as against one defendant for want of jurisdiction over him, it must be considered as void as to all of them and therefore a mere nullity. Holbrook v. Murray, 5 Wend. 161; Winslow v. Lombard, 57 Me. 356; Shuford v. Cain, 1 Abb. (U. S.), 302; Burt v. Stevens, 22 N. H. 299; Rangely v. Webster, 11 N. H. 229; Hall v. Williams, 6 Pick. 232; City of St. Louis v. Gleason, 15 Mo. App. 25; Knapp v. Abel, 10 Allen, 485; Richards v. Walton, 12 Johns. 434; Hughes v. Lindsay, 10 Ark. 555; Buffum v. Ramsdell, 55 Me. 252; Smith v. Rollins, 25 Mo. 408; Brockman v. McDonald, 16 Ill. 112; Hulme v. Jones, 6 Tex. 242; Donnelly v. Graham, 77 Pa. St. 274; Van Rensalaer v. Whiting, 12 Mich. 449; Long v. Garnet, 45 Tex. 400. Thomas v. Lowry, 60 Ill. 512; Williams v. Chalfant, 82 Ill. 218. In some States it is held that if the judgment was made the basis of an action against one judgment debtor who had been served with process, he could show the iregularity of the proceedings in respect of his co-defendant and that would be sufficient to defeat a recovery against himself. Holbrook v. Murray, 5 Wend. 161; Hanley v. Donoughue, 59 Md. 239. But this is not the prevailing doctrine. In a majority of the States it is held that a joint judgment may be void as against one defendant for lack of jurisdiction, and valid and binding on the others. North v. Mudge, 13 Ia. 498; Jamison v. Pomeroy, 9 Pa. St. 230; Ash v. McCabe, 21 Ohio St. 181; Mercer v. James, 6 Neb. 406; Cheek v. Pugh, 19 Ark. 574; St. John v. Holmes, 20 Wend. 609; Shallcross v. Smith, 81 Pa. St. 132; Brittin v. Wilder, 61 Hill, 242; York Bank Appeal, 36 Pa. St. 460; Kitchens v. Hutchins, 44 Ga. 620; Newburg v. Munshowser, 29 Ohio St. 617; Green v. Beals, 2 Cains, 254; Winchester v. Beardin, 10 Hump. 247; Smith v. Tupper, 43 Am. Dec. 483; Collins v. Knight, 3 Tenn. Ch. 183; Murphy v. Orr. 32 Ill. 489; Crank v. Flowers, 4 Heisk. 629. But there is less diversity of opinion as to the proper disposition to be made of a joint judgment which is void as to one defendant, when it is brought by writ of error or appeal before a court of review. On this point there is almost unanimity of opinion that the judgment cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety. While unreversed, however, it ought not to be open to impeachment by the debtor as to whom no irregularity exists in any collateral proceeding. McDonald v. Wilkie, 13 Ill. 22; Gaylord v. Payne, 4 Conn. 190; Harmon v. Brotherson, Denio, 537; Craikshank v. Gardner, 2 Hill, 333; Mutual Life Insurance Company v. Clover, 36 Mo. 392; Kimball v. Tanner, 63 Ill. 519; Dickson v. Burke, 28 Tex. 117; Powers v. Irish, 23 Mich. 429; Fuller v. Bobb, 26 Ill. 246; Ellison v. State, 8 Ala. 273; Ward v. Smith, 11 Tex. 367; Frazier, Williams, 24 Ohio St. 625. This applies, however, only to a joint judgment, for if the judgment is several as to the parties it may be reversed in part and affirmed in part. Buffum v. Ramsdell, 55 Me. 252; Powers v. Irish, 23 Mich. 429.

In order to escape the hardships of the common law rule on this subject a number of the States have passed statutes providing that when service is had in an action on an alleged joint liability, against some of the defendants, but jurisdiction is not obtained over the others the plaintiff may still proceed to trial against those who are before the court and may have judgment against all who are jointly liable, but it must be so entered as to be enforceable only against the joint property of all and the separate property of those on whom service was had. Nelson v. Bostwick, 5 Hill, 37: Gunzberg v. Miller, 39 Mich. 80; Stehr v. Olbermann, 49 N. J. L. 633; Johnson v. Lough, 22 Minn. 203. See also Codes of California and New York; Fleming v. Freese, 26 N. J. L. 263.

A judgment is a vested right of property and can be satisfied only by payment or release. Smith v. Richards, 21 Pac. Rep. 419. See Harris v. Mott, 97 N. C. 103. But payment by even a stranger will extinguish it in the absence of any understanding that it is to be continued in force for the benefit of the party making the payment. Terry v. O'Neal, 71 Tex. 592. See Skillings v. Massachusetts Benevolent Association, 23 N. E. Rep. 1136; Rogers v. Wette, 61 Mich. 268; Montgomery v. Vickroy, 110 Ind. 211. And satisfaction of a judgment or decree once entered cannot be set aside except all the parties against whom it was rendered are made parties to the action to set aside the satisfaction. Blackburne v. Clarke, 85 Tenn. 506.

As to who may give a valid discharge of a judgment and what will amount to a discharge, it was held in Weeks v. Wayne Circuit Judges, 41 N. W. Rep. 269, that a plaintiff who has agreed that his attorneys shall have a reasonable compensation for their services from the proceeds of the judgment, cannot acknowledge satisfaction of the judgment until the compensation due the attorneys has been paid. Jones v. Andrews, 9 S. W. Rep. 170. And a release by a judgment creditor at the instance of the debtor, of one of several tracts of land bound by a judgment will not operate as a release of the others. Wolfe v. Gardner, 4 Harring. 338. There may be a species of release in equity or by estoppel. Barnes v. Mott, 64 N. Y. 397; and a release may be given by parol. Dalby v. Croukhite, 22 Ia. 222. For other illustrations see Molyneaux v. Marsh, 1 Woods, 452; Penn v. Edwards, 50 Ala. 63; Snyder v. Brachen, 5 Biss. 60; De La. Vergne v. Evertson, 19 Am. Dec. 411.

A part of a judgment entire in its nature cannot be assigned so as to give a right of action to the assignee. Smith v. Stockdale, 3 Pa. Co. Court, 113; Burnett v. Crandall, 63 Mo. 410; Hopkins v. Stockdale, 11 Atl. Rep. 368; Wood v. Wallace, 24 Ind. 226; Loomis v. Robinson, 76 Mo. 448; Goddard v. Kirkpatrick, S. E. Rep. 156; Hank v. Harris, 29 Ark. 323. See Callender v. Drabelle, 73 Ia. 317. If a holder of a judgment agrees to compromise it and assigns it to one who pays the amount so agreed upon the assignee cannot collect a larger amount. Sutton v. Sutton, 26 S. C. 33. The assignee of a judgment stands in no better position than the original plaintiff. Webster v. Tschetler, 46 N. W. Rep. 201; Rawson v. McJunkin, 27 Ga. 432; Burson v. Blair, 12 Ind. 371; Hughes v. Trahem, 64 Ill. 48; Downer v. South Royalton Bank, 39 Vt. 25; Puett v. Beard, 86 Ind. 178; Brisbin v. Newhall, 5 Minn. 373; Burtis v. Cook, 16 Ia. 144.

## HUMORS OF THE LAW.

A judge, in pronouncing the death sentence, tenderly observed: "If guilty, you deserve the fate that awaits you; if innocent, it will be a gratification for you to feel that you were hanged without such a crime on your conscience; in either case you will be delivered from a world of care.

The jury brought in a verdict of "Not guilty." The judge said admonishingly to the prisoner:

"After this you ought to keep away from bad company."

"Yes, your honor, you will not see me here again in a hurry."

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**



1. ADMINISTRATORS—Actions.—An administrator appointed in Michigan cannot maintain an action in his representative capacity in the United States circuit court in New York to recover from residents of that State property alleged to have been conveyed to them by the intestate in fraud of his creditors, when he has never taken out letters of administration in New York. —*Johnson v. Powers*, U. S. S. C., 11 S. C. Rep. 525.

2. ADVERSE POSSESSION—Schools.—Land was conveyed to certain trustees of a union meeting and school house in trust for the benefit of said meeting and school house. Afterwards a school-district, which was created after the land was conveyed, erected and maintained a school house on the land: *Held*, that the school-district thereby acquired no title to the land, since its use of the land was merely permissive.—*Common School Dist. v. Richard*, Penn., 21 Atl. Rep. 821.

3. APPEAL—Bill of Exceptions.—Where exceptions are copied into the record by the clerk, but are not included in the bill of exceptions, they do not become part of the record.—*Lewis v. Goodman*, Ind., 27 N. E. Rep. 565.

4. APPEAL—Jurisdictional Amount.—The amount in dispute in a case where defendant files a counter-claim is the aggregate of what is claimed by both sides, and, that being within the jurisdiction of the supreme court, and defendant's counter-claim disallowed, plaintiff cannot defeat defendant's right to a writ of error by remitting enough of his judgment to bring it below the jurisdictional amount of the supreme court.—*Block v. Darling*, U. S. S. C., 11 S. C. Rep. 832.

5. APPEAL—Mandate.—Plaintiff had judgment in the supreme court of the District of Columbia for damages and costs, but nothing was said of interest. On appeal the Supreme Court of the United States affirmed the judgment. On motion of plaintiff in the court below, judgment was entered up for interest on the original judgment from its date. *Held*, that the court was without jurisdiction to give the judgment for interest.—*Ex parte Washington & G. R. Co.*, U. S. S. C., 11 S. C. Rep. 673.

6. APPEAL—New Trial.—Errors occurring during the trial cannot be considered by the supreme court unless a motion for a new trial, founded upon and including such errors, has been made by the complaining party, and acted upon by the trial court.—*Duigenan v. Claus*, Kan., 26 Pac. Rep. 699.

7. APPEAL—Rehearing.—An application for a rehearing, made after the adjournment of the terms at which a final decree is rendered is too late.—*Bank v. Sheffey*, U. S. S. C., 11 S. C. Rep. 755.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A debtor made an assignment for the benefit of his creditors of "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed or intended so to be." The schedule which was verified by the oath of the assignor, made no mention of his stock of merchandise. *Held*, that title to such stock did not pass to the assignee, but it remained subject to attachment against the assignor.—*Bock v. Perkins*, U. S. S. C., 11 S. C. Rep. 677.

9. ATTACHMENT—Preference.—If a debtor, in good faith, prefers some creditors to others, either by making payments, or transferring his property, or giving chattel mortgages, this is not, of itself ground for the issuing of an attachment against the debtor.—*Abernathy Furniture Co. v. Armstrong*, Kan., 26 Pac. Rep. 693.

10. ATTORNEY AND CLIENT—Compensation—Contract. —By the terms of the appointment which plaintiff accepted as attorney and law agent for a mortgage loan company, he was required "to be responsible that all mortgages taken are a clear and and indisputable first lien upon the subjects mortgaged, and to grant certificates to that effect." The only compensation provided consisted of fees from borrowers, and the appointment fixed a scale of his "professional fees against borrowers, including abstracts, searches, investigating titles, preparation and recording of mortgages." *Held*, that these fees were also intended to cover the prescribed certificates of title, and he is not entitled to any additional compensation therefor.—*Hughes v. Dundee Mortgage & Trust Investment Co.*, U. S. S. C., 11 S. C. Rep. 727.

11. BANKS—Check.—In an action on a check against the drawer, it is sufficient to allege that the check was duly presented and payment refused. The motive of the bank for the refusal is immaterial, and it is not necessary to aver that the drawer had no funds in the bank.—*Offutt v. Rucker*, Ind., 27 N. E. Rep. 589.

12. BASTARDY—Bond.—A bond given in a bastardy proceeding to idemnify townships against expenses for the education as well as for the birth and maintenance of the bastard, does not contain a condition more onerous than that required by the statute. Education may be included in the duty to support.—*State v. Such*, N. J., 21 Atl. Rep. 852.

13. CARRIERS—Parol Evidence.—Where the written contract of a carrier for the transportation of goods is silent as to the time of shipment, the implied obligation to ship within a reasonable time after the goods are delivered is a part of the contract, and cannot be modified by parol evidence of an undertaking to ship on a certain train.—*Pennsylvania Co. v. Clark*, Ind., 27 N. E. Rep. 586.

14. CARRIERS—Passengers—Negligence.—Where the conductor on a railroad train calls the name of the station, and the engineer, before reaching there, though without the conductor's knowledge, stops the train over a trestle, to take on water, the company is liable for injuries sustained by a passenger in getting off the train, if he was not notified, and the surroundings did not show, that he was not at the station.—*Richmond & D. R. Co. v. Smith*, Ala., 9 South. Rep. 224.

15. CHATTEL MORTGAGES—Renewal.—A subsequent mortgagee, who becomes such before the expiration of the year from the first filing of a prior chattel mortgage, cannot take advantage of an omission to renew he chattel mortgage within the year.—*Farmers' &*

*Merchants' Bank v. Bank of Glen Elder*, Kan., 26 Pac. Rep. 680.

16. CHINESE—Right of Entry.—No Chinese person, formerly resident in the United States but temporarily absent therefrom, is entitled to return without the prescribed certificate required by Act Cong. May 6, 1882.—*Wan Shing v. United States*, U. S. S. C., 11 S. C. Rep. 729.

17. CONSTITUTIONAL LAW—Fourteenth Amendment.—City ordinance No. 2191 of San Francisco, making it a punishable offense to visit any gambling place located within certain specified limits, which designates what is known as the "Chinese quarter," applies to all alike, since white men as well as Chinese live therein, and the prohibition extends to "any person," irrespective of race or color, and is therefore within the language of the fourteenth amendment.—*In re Ah Kit*, U. S. C. C. (Cal.), 45 Fed. Rep. 793.

18. CONTEMPT OF COURT.—Criticism or contemptuous language in regard to the acts and declarations of the judge of the trial court, embodied in a brief filed in the appellate court are not in contempt of the trial court.—*In re Dalton*, Kan., 26 Pac. Rep. 673.

19. CONTRACT—Exchange—Possession.—Where M, the owner of a tract of land, and C, the owner of a horse, exchange the one for the other, M executing to C a warranty deed for the land, and C executing to M an absolute bill of sale for the horse, giving to M in terms the right to the immediate possession of the horse, *held*, that M at once becomes the owner of the horse, and entitled to the immediate possession thereof.—*Cunningham v. Martin*, Kan., 26 Pac. Rep. 696.

20. CONTRACT—Town Site Companies.—A contract, entered into by a town company, incorporated "for the purchasing of lands, the surveying and platting of town sites and selling town lots and other lands," in which it was agreed that if R would remove a bank, barn, and restaurant located elsewhere to the townsite, the town company would convey to him certain lots in the town, and pay him the sum of $1,000 tends directly to enhance the value of the remaining property of the corporation, and is not necessarily *ultra vires*.—*Sherman Center Town Co. v. Russell*, Kan., 26 Pac. Rep. 715.

21. CONTRACTS FOR PERSONAL SERVICES—Assignment.—A contract whereby the owner of land gives a lawyer the option of buying it at a certain price, in consideration of the latter taking all legal steps to perfect the title, cannot be enforced by an assignee of the lawyer, since an executory contract for personal services requiring skill is not assignable.—*Sloan v. Williams*, Ill., 27 N. E. Rep. 531.

22. CONTRACT TO MAKE A WILL.—Upon the facts, *held*, that the will was intended by testator as a substitute for the contract, and by electing to recover the benefits thereof plaintiff abandoned his right to enforce the contract.—*Towle v. Towle*, Wis., 48 N. W. Rep. 800.

23. COPYRIGHT—Labels.—That clause of the constitution which authorizes congress to secure to authors and inventors for a limited time the exclusive right to their respective writings and discoveries does not include mere labels, whose object is only to indicate the contents of the package to which they all are affixed.—*Higgins v. Keuffel*, U. S. S. C., 11 S. C. Rep. 731.

24. CORPORATIONS—Officers.—Where a director and superintendent, on behalf of the corporation, contracts with a third person for work and material, paying him an excessive price therefor, or reserving to himself individually a discount or commission, he is liable to account to the corporation.—*Perry v. Tuscaloosa Cotton Seed Oil-mill Co.*, Ala., 9 South. Rep. 217.

25. COUNTIES—Bonds—Railroad.—Laws Mo. 1851, pp. 483, 486, authorizing counties to subscribe to the stock of a certain railroad, provide that the county may issue bonds "to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county." *Held*, that this confers authority to levy a tax sufficient to pay the interest on such bonds, though the general laws restrict the tax rate "for county purposes" to one-half of one per cent.—*County Court v. United States*, U. S. S. C., 11 S. C. Rep. 697.

26. CREDITORS' BILL.—Where a petition in equity in the nature of a creditors' bill is filed, alleging the insolvency of a partnership, and praying an injunction and appointment of a receiver, creditors who on their own application are made plaintiffs after the receiver is appointed become chargeable with their proportion of counsel fees for filing the petition, as provided by Code Ga. 3149c.—*Lowry Banking Co. v. Abbott*, Ga., 13 S. E. Rep. 204.

27. CRIMINAL LAW—Assault and Battery.—On a trial for assault and battery, where it appears that a lessor, in the temporary absence of the lessee, nails up the doors of the house, and the latter, on returning, breaks in with the aid of his wife, and hurls a stone at the lessor, near by, who follows him into the house and assaults him, it is not error to charge that the lessor, though honestly believing that that the lessee was going for a loaded gun to use against him, was not justified in following him, and using force, if he could have escaped from the peril by getting away.—*State v. McKinley*, Iowa, 48 N. W. Rep. 804.

28. CRIMINAL LAW—Bail Pending Appeal.—Unless extraordinary circumstances intervened, a person convicted of felony ought not to be admitted to bail pending appeal.—*Ex parte Smith*, Cal., 26 Pac. Rep. 638.

29. CRIMINAL LAW—Murder — Corpus Delicti.—Upon the facts, *held*, sufficient proof of the *corpus delicti*.—*Jackson v. State*, Tex., 16 S. W. Rep. 247.

30. CRIMINAL PRACTICE—Joinder of Offenses.—Several separate and distinct felonies may be charged in separate counts of one and the same information, where all the offenses charged are of the same general character, requiring the same mode of trial, the same kind of evidence, and the same kind of punishment; and the defendant may be tried upon all the several counts at one and the same time,—all resting in the sound judicial discretion of the trial court.—*State v. Hodges*, Kan., 26 Pac. Rep. 676.

31. CRIMINAL PRACTICE—Murder—Accessory.—Where two persons jointly indicted for murder are tried separately, the record of the acquittal of one is not admissible in evidence at the trial of the other, even though evidence tends to show that he was an accessory before the fact.—*People v. Kief*, N. Y., 27 N. E. Rep. 566.

32. CRIMINAL PRACTICE—New Trial.—The affidavit of defendant's husband that he, and not defendant, killed deceased: that before the trial he told her of it, but refused to allow her to use the communication; and the affidavit of defendant that this fact was communicated to her by her husband, but that he did not give her permission to use it—are not *per se* grounds for a new trial.—*People v. Merkle*, Cal., 26 Pac. Rep. 642.

33. CRIMINAL TRIAL—Homicide—Evidence—Waiver.—The fact that defendant's attorney, after repeatedly objecting to the admission of such evidence, persistently sought to be brought out by the State notwithstanding the court ruled it incompetent, consents to the witness' saying what the remark was in reply to inquiry from the jury, is not a waiver of defendant's objection. The evidence being incompetent and prejudicial, the court should not have admitted it, even with consent of counsel, and, having done so, should have stricken it out.—*People v. Wallace*, Cal., 26 Pac. Rep. 650.

34. DEED—Acknowledgment by Wife.—A deed conveyeying real estate of the husband, signed by him and his wife, and acknowledged by the wife alone, separate and apart from her husband, that she signed the same voluntarily, and without any compulsion, apprehension, or fear from her husband; is not such proof of the execution of the deed as will admit it to record as being duly acknowledged or proven according to law.—*L'Engle v. Reed*, Fla., 9 South. Rep. 213.

35. DIVORCE—Attorney's Fees.—The remedy given by § 12 ch. 25 Comp. St. for attorneys for the wife is exclusive and the attorney cannot afterwards maintain an action against the husband for fees in addition to those al-

lowed by the court and paid.—*Bumham v. Tizard*, Neb., 48 N. W. Rep. 823.

36. DIVORCE — Inhuman Treatment. — A divorce will not be granted the wife on the ground of inhuman treatment endangering life, where the treatment complained of consisted in the use of profane and indecent language, false accusations of unchastity, and threats against her life, in the presence of their child, no physical violence being shown when such language was provoked by the undignified and improper conduct of the wife with other men.—*Evans v. Evans*, Iowa, 48 N. W. Rep. 809.

37. EMINENT DOMAIN — Compensation. — In appeals from the awards of commissioners in condemnation proceedings, opinions as to the value of property should be confined to the property in question, unless on cross examination, for the purpose of testing the knowledge and competency of the witness, the value of adjoining property is inquired of.—*Kansas City & T. Ry. Co. v. Vickroy*, Kan., 26 Pac. Rep. 698.

38. EQUITABLE SET-OFF.—A judgment against an administrator on a debt contracted by the intestate, and enforceable against him in his life-time, may, in equity, be set-off against a judgment rendered in favor of the administrator against the judgment creditor. Such right of equitable set-off cannot be affected by the fact that there are no assets other than the judgment, and that the estate is indebted to the administrator for costs to an equal amount.—*Wikel v. Garrison*, Iowa, 48 N. W. Rep. 803.

39. EXECUTION SALE.—After the time within which a sheriff may give a deed to a purchaser at execution sale has expired, he cannot give a deed in correction of a former deed given by him during such time.—*Parker v. Shannon*, Ill., 27 N. E. Rep. 525.

40. EXEMPTION—Pleading.—Under Rev. Stat. Ind. 1881, § 703, a plaintiff, whose entire property does not exceed $600 may claim as exempt the demand in suit and thus defeat a judgment pleaded against him in set-off.—*Coppage v. Gregg*, Ind., 27 N. E. Rep. 570.

41. FRAUDULENT CONVEYANCE—Chattel Mortgage.—If a *bona fide* creditor, by his vigilance, obtains the first lien and prior right to all the property of his debtor, owned at the time a chattel mortgage is executed to secure him, it i s the excercise of an undoubted right which he has, and the law will protect him in the advantage thereby secured.—*Bliss v. Couch*, Kan., 29 Pac. Rep. 706.

42. FRAUDULENT CONVEYANCES—Husband and Wife.—A bill to set aside a conveyance, alleging that defendant, soon after incurring a debt to complainant, conveyed nearly all his land for a nominal consideration of "$50 and other things of value" to a stranger, who immediately conveyed it to grantor's wife for the same consideration is sufficient, though there is no allegation of fraudulent intent.—*Sides v. Schaif*, Ala., 9 South. Rep. 228.

43. GARNISHMENT—Default Judgment.—A final judgment by default against a garnishee is void when for a greater sum than that stated in the affidavit for garnishment and the garnishee writ as the amount of the original judgment.—*Carroll v. Milner*, Ala., 9 South. Rep. 221.

44. GUARDIAN — Marriage. — Before the passage of Mansf. Dig. Ark. § 3486, providing that the marriage of a female guardian shall revoke his appointment, where a guardian continued to act as such after her marriage, a sale of the ward's land by her authorized and confirmed by the probate court was valid.—*Alexander v. Pointer*, Ark., 16 S. W. Rep. 284.

45. HABEAS CORPUS— Federal Courts. — The federal court cannot by a writ of *habeas corpus* review the decision of a State court in a criminal case, or disturb the custody of defendant, on the ground that persons of the negro race were excluded from the grand jury which found the indictment against him, and from the trial jury.—*Wood v. Brush*, U. S. S. C., 11 S. C. Rep. 738.

46. INJUNCTION—Illegal Taxes.—Injunction will not lie to restrain the sale of the property of a sleeping car company to collect a privilege tax or license on the ground of the unconstitutionality of such tax, where no independent ground of equitable jurisdiction is shown, and the consequences sought to be prevented may be avoided by complying with the provision of the State laws in the case of alleged illegal taxes.—*Allen, v. Pullman's Palace Car Co.*, U. S. S. C., 11 S. C. Rep. 682.

47. INJUNCTION — Trade Secrets. — Where a manufacturing company has sold part of its plant, and has ceased to do business for more than a year, it cannot maintain an action to enjoin any person from asserting that the company has gone out of business, and that he is its successor, since such acts cannot injure it.—*Shonk Tin Printing Co. v. Shonk*, Ill., 27 N. E. Rep. 529.

48. INNKEEPERS—Refusal of Entertainment.—In an action against an innkeeper for refusal to entertain plaintiff, an invalid, thereby preventing him from receiving the benefit of the water of a mineral spring appurtenant to the hotel, from which it is alleged that he had derived much benefit theretofore, it is not error to allow plaintiff to testify that deprivation of the water had injured his health.—*Willis v. McMahon*, Cal., 26 Pac. Rep. 649.

49. INSOLVENCY—Petition.—Under the insolvent act of California (1880), § 8, providing that an adjudication of insolvency may be made on the petition of five or more creditors, whose debts amount in the aggregate to not less than $500, a petition setting forth that the demand is for a certain sum, and accrued for goods sold and delivered at a certain place by petitioners to respondent, within one year last past, at his request, sufficiently states the debt.—*In re Dennery*, Cal., 26 Pac. Rep. 638.

50. INSURANCE—Application.—Where the assured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon does not invalidate the policy.—*Vankirk v. Citizens' Ins. Co. of Pittsburg*, Wis., 48 N. W. Rep. 798.

51. INSURANCE—Conditions.—Limitations.—An action on a policy of insurance conditioned that suit thereon shall be brought within a year is brought in time if the original summons is issued within a year, though it is afterwards set aside and an *alias* summons issued after expiration of the year.—*Everett v. Niagara Ins. Co.*, Penn., 21 Atl. Rep. 817.

52. INSURANCE—Conditions—Waiver.—To constitute a waiver by an insurance company of a condition in a policy limiting the time within which suit shall be brought, the act relied on must have been done during the period of limitation.—*Everett v. London, etc. Ins. Co.*, Pa., 21 Atl. Rep. 819.

53. INSURANCE—Parol Evidence.—Where an application for insurance has been reduced to writing, and the applicant has had an opportunity to read the same, but signs it without reading it, and there is no fraud practiced, and the applicant afterwards receives the policy of insurance, he cannot, in an action brought upon a note given for the premium, vary or contradict the statements in the written application by parol evidence.—*Walker v. State Ins. Co.*, Kan., 26 Pac. Rep. 718.

54. INSURANCE COMPANIES—Foreign. — Where an application for life insurance in a Pennsylvania company is taken by an agent in Indiana, and forwarded to the home office in Philadelphia, and upon the receipt of the policy issued thereon the agent delivers it to the assured, and receives from him the first payment, the contract is consummated in Indiana. — *Wiestling v. Marthim*, Ind., 27 N. E. Rep. 576.

55. INTOIXCATING LIQUORS — License. — Under the charter of the city of Atlanta, conferring on the mayor and council "full power and authority to regulate the retail of ardent spirits," and, "at their discretion, to issue license to retail or to withhold the same," they have authority to pass an ordinance that conviction of violation of the State statute prohibiting the sale of liquor to a minor shall work an immediate revocation of the license.—*Sprayberry v. City of Atlanta*, Ga., 13 S. E. Rep. 197.

56. INTOXICATING LIQUORS — Prohibition. — An ordinance prohibiting the sale of intoxicating liquors, though for want of legislative authority it may be void as to druggists, is not for that reason void as to other persons if the city has authority to forbid sales by them.—*Ex parte Cowert*, Ala., 9 South. Rep. 225.

57. JUDGMENTS—Ancillary Receiver. — A judgment against the ancillary receiver in New York of a New Jersey corporation will bind only such portion of the assets as have come into his hands as such, and cannot bind the assets in the hands of the receiver in another State, where the administration was originally commenced.—*Reynolds v. Stockton*, U. S. S. C., 11 S. C. Rep. 773.

58. JUSTICES OF THE PEACE—Jurisdiction.—A justice's court has no jurisdiction of a suit against a foreign corporation.—*Wheeler & Wilson Manuf'g Co. v. Carty*, N. J., 21 Atl. Rep. 851.

59. LABORERS' WAGES—Priorities.—The claims of laborers for services to a corporation which has been declared to be insolvent are not entitled to precedence in payment over liens acquired by judgment, execution, and levy thereunder, or by distress for rent, which antedate the time which the court adjudges to be the time of the corporation's insolvency.—*Wright v. Wynockie Iron Co.*, N. J., 21 Atl. Rep. 862.

60. LANDLORD AND TENANT — Lien. — In an action against a husband and wife upon a lease to which she was not a party, the personal property of the wife used on the demised premises is not liable to attachment for rent due on the lease, where it appears that the rent due for the time her property was so used has been paid.—*Scheiz v. McMenamy*, Iowa, 48 N. W. Rep. 806.

61. LIFE INSURANCE — Conditions—Intemperance.—In an action on a life insurance policy containing a stipulation that it should be void if the insured should become so far intemperate as to impair his health, or induce *delirium tremens*, the wife of deceased, after introduction of evidence as to his intemperate habits, may testify that in her presence, a physician, since deceased, prescribed alcoholic stimulants for deceased, and that she prepared them for him.—*Ætna Life Ins. Co. v. Ward*, U. S. S. C., 11 S. C. Rep. 720.

62. LIFE INSURANCE—Conflict of Laws.—A resident of Missouri signed in that State an application for life insurance. The policy was executed by the insurer at its office in New York, and transmitted to Missouri, where it was delivered to the assured and where the premiums thereon were paid: *Held*, that the policy only became a completed contract on its delivery and the payment of the premium in Missouri; so that it is a Missouri contract, and governed by the laws of that State.—*Equitable Life Assur. Soc. v. Pettas*, U. S. S. C., 11 S. C. Rep. 822.

63. LIMITATIONS— Laches. — After the lapse of five years from the entry of a decree declaring taxes levied by a county illegal, and enjoining their collection, the county is estopped to sue to set the decree aside for fraud, both on the ground of laches and under Gen. St. Neb. 1873, ch. 57, tit. 2, § 12.—*County of Boone v. Burlington & M. R. R. Co.*, U. S. S. C., 11 S. C. Rep. 687.

64. MARRIAGE—Legality. —*Held*, upon the facts that there was not such an assumption of marital rights as could constitute a civil marriage under Civil Code Cal. § 55, requiring that consent to the marriage must be followed by a mutual assumption of marital rights, duties, and obligations.—*Kilburn v. Kilburn*, Cal., 26 Pac. Rep. 636.

65. MASTER AND SERVANT—Defective Tools.—As between a railway company and its employees, the railway company is required to exercise reasonable and ordinary diligence in furnishing to its employees reasonably safe tools with which to perform the work committed to them.—*Chicago, etc. R. Co. v. Blevins*, Kan., 26 Pac. Rep. 687.

66. MASTER AND SERVANT—Fellow-servants.—One who is employed by a railroad company, under a foreman, to make repairs in its repair-shops and on cars standing in its yards, is not a fellow-servant of a switchman, who, under orders of the yard-master, directs the movement of cars in the yard.—*Pool v. Southern Pac. R. Co.*, Utah, 26 Pac. Rep. 654.

67. MECHANICS' LIENS—Findings.—In an action to enforce a mechanic's lien, the right to which depends on the filing of a notice within a certain number of days after the completion of the building, a finding that the building was completed "on or about" a certain day is insufficient.—*Cohn v. Wright*, Cal., 26 Pac. Rep. 643.

68. MECHANICS' LIENS — School Buildings.—A public school-house is not subject to the mechanic's lien laws. —*Mayrhofer v. Board of Education*, Cal., 26 Pac. Rep. 646.

69. MORTGAGES—Estoppel.—Plaintiff held a mortgage on crops to secure his rent, and defendants, with full knowledge of his lien, sold goods to the tenant, and took hay, covered by the mortgage, in payment. At plaintiff's request the bank holding the note for the rent wrote defendants that the mortgage existed, and that for their own protection they should satisfy themselves that it had been paid. Plaintiff also wrote to his tenant that the sale to defendants was a good one: *Held*, that these letters did not estop plaintiff to require defendants to account to him for the value of the hay received.—*Crittenden v. Pratt*, Cal., 26 Pac. Rep. 626.

70. MORTGAGES — Lease for Mortgagor to Sell.—An agreement between the mortgagees and mortgagor that the latter shall have "full right and permission to sell the property named in the deeds, and make titles thereto, the proceeds of sale to go to the credit" of the mortgagees, empowers the mortgagor to sell and transfer title discharged of the lien by the mortgagee, but gives him no right to convey the land in exchange for a conveyance to him of other land.—*Woodward v. Jewell*, U. S. S. C., 11 S. C. Rep. 784.

71. MORTGAGES—Release.—Where an agreement was made between mortgagor and mortgagee, for a good consideration, releasing the mortgagor from personal liability on the debt, the grantee of the mortgagor who purchases subject to the mortgage, cannot complain of such release; nor can the payment, in consideration of the release, be regarded as a satisfaction of the mortgage as to him.—*Osborn v. Williams*, Iowa, 48 N. W. Rep. 811.

72. MUNICIPAL CORPORATIONS—Street Improvements. —After passing an ordinance for paving a street to be paid for by special assessment, a city council passed a second ordinance for a viaduct on said street. After passage of the second ordinance, a petition was filed for assessment of benefits on account of the paving: *Held*, that such assessment could not be made, since there was no ordinance describing the contemplated improvement, as it would be made after construction of the viaduct, as required by Rev. St. Ill. ch. 24, art. 9, § 19.—*St. John v. City of East St. Louis*, Ill., 27 N. E. Rep. 543.

73. MUNICIPAL CORPORATION—Violation of Ordinance. —Where the penalty for carrying on business without registering the same is graduated by ordinance according to the number of days the business has been carried on, the maximum fine for three days' business cannot be imposed if the accusation is by summons, which specifies one day only, and makes no charge as to more than one day.—*Phillips v. City of Atlanta*, Ga., 13 S. E. Rep. 201.

74. MUTUAL BENEFIT INSURANCE. — A certificate, whereby the association agrees in the event of the member's death to pay the beneficiary $1,500, "provided that in case the amount realized from one full assessment should be insufficient to pay the face value of this certificate then the beneficiary shall accept the result of such assessment as payment in full," is sufficient to support a judgment for $1,500, since the burden of proving that an assessment, if made, would not produce that amount is upon the association.—*Metropolitan Safety Fund Accident Ass'n v. Windover*, Ill., 27 N. E. Rep. 538.

75. NEGLIGENCE.—Plaintiff's contributory negligence cannot exonerate defendant and bar plaintiff's

covery where defendant might, by the exercise of reasonable care and prudence, have avoided its consequences.—*Inland & Seaboard Coasting Co. v. Tolson*, U. S. S. C., 11 S. C. Rep. 653.

76. NEGLIGENCE—Contaminated Water.—In an action against a water supply company for the death of plaintiff's children from typhoid fever, alleged to have been caused by defendant's negligence in supplying contaminated water, plaintiff is not injured by the rejection of evidence of the existence of the fever along the river from which defendant drew its water supply, and of the infection of the water, where there is no evidence that defendant knew of the disease.—*Buckingham v. Plymouth Water Co.*, Penn., 21 Atl. Rep. 824.

77. NEGOTIABLE INSTRUMENTS—Extension.—An agreement in writing between the holder and the accommodation indorser of a note by which the latter "consents that the payment thereof be extended until he gives written notice to the contrary," does not contemplate an extension by agreement between the holder and the maker only, by which the surety on the note is discharged, and the indorser prevented from having recourse to him as well as to the maker.—*Bank of Uniontown v. Mackey*, U. S. S. C., 11 S. C. Rep. 814.

78. NEW TRIAL—Verdict.— When a jury returns answers to special questions which are essential to a recovery, but in fact unsupported by any evidence, the trial court should sustain a motion for a new trial.—*Atchison, etc. R. Co. v. Long*, Kan., 26 Pac. Rep. 682.

79. NOTARY PUBLIC—Sureties.—As receiving money is no part of the official duty of a notary, his sureties are not liable for that fraudulently retained by him, but only for the damages caused plaintiff by the falsehood of his certificate of acknowledgment.—*Heidt v. Minor*, Cal., 26 Pac. Rep. 627.

80. PARENT AND CHILD—Domestic Service.—In an action by a daughter against her father to recover for domestic services rendered while living as a member of his family, although a contract to pay for such services is essential to her recovery, an express contract need not be shown, but it may be inferred from the surrounding circumstances.—*Story v. Story*, Ind., 27 N. E. Rep. 573.

81. PATENTS FOR INVENTIONS — Contracts — Federal Question.—A suit against a patentee for specific performance of a contract alleged to have been made between defendant and complainant, by which the latter was to have the right to make and use the patented article, and to enjoin defendant from interfering with such use, involves no federal question, and is exclusively in the jurisdiction of the State courts.—*Marsh v. Nichols, Shepard & Co.*, U. S. S. C., 11 S. C. Rep. 798.

82. PRINCIPAL AND AGENT— Ratification.—Where an owner gives his agent authority to rent his premises, and it is not shown whether the authority of the agent as to the length of the lease was limited or not, and the agent leases for two years, while the owner claims that he had no authority to execute a lease for more than a year, but notwithstanding accepts rent from the tenants for four months after the end of the first year, he thereby ratifies the lease for the entire term.—*Burkhard v. Mitchell*, Colo., 26 Pac. Rep. 657.

83. PUBLIC LANDS—Homestead Claimant.— By the act of congress of March 14, 1880, any settler who had or should thereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, was allowed the same time to file his homestead application and perfect his original entry, in the United States land-office, as was allowed to settlers under pre emption laws to put their claims on record, and his right relates back to the date of settlement, the same as if he settled under the pre-emption laws.—*Faull v. Cooke*, Oreg., 26 Pac. Rep. 662.

84. PUBLIC LAND—Patents.—Receipt by the patentee of a patent for land issued to him by the United States is not necessary to pass title.—*Elizroth v. Ryan*, Cal., 26 Pac. Rep. 647.

85. PUBLIC LANDS — Pre-emption.— Plaintiff and defendant filed on separate and adjoining tracts of land and made improvements thereon. Defendant, without the knowledge of plaintiff, obtained permission to amend his declaratory statement so as to include the tract on which plaintiff had settled, and thus bought that tract, and had it included in his patent: *Held*, that this amendment was in violation of Rev. St. U. S. § 2261, which prohibits a pre-emptor from filing at a future time a second declaration for another tract, and the patent thereon issued cannot defeat plaintiff's rights.—*Sanford v. Sanford*, U. S. S. C., 11 S. C. Rep. 666.

86. PUBLIC LANDS—Railroad Grants.— Though Act Cong. July 25, 1866, making a grant of a portion of the public land and a right of way through it in aid of the railroad therein mentioned, provides in section 6 that in case of the failure to complete the railroad within the prescribed time the "act shall be null and void," mere failure to complete the road in the time limited does not forfeit the right to construct it, for the grant is on condition subsequent, and no forfeiture takes effect without some action by the grantor manifesting an intention to resume its title.—*Bybee v. Oregon & C. R. Co.*, U. S. S. C., 11 S. C. Rep. 641.

87. PUBLIC LANDS— Riparian Rights — Boundaries.— Patents by the United States of land bounded by streams and other waters, in the absence of reservation or restriction of terms, are to be construed, as to their effect, according to the law of the State in which the land lies.—*Harden v. Jordan*, U. S. S. C., 11 S. C. Rep. 808.

88. PUBLIC LANDS—Town site—Existing Mines.—Under Rev. St. U. S. § 2392, providing that "no title shall be acquired" under the provisions relating to town-sites, and the sale of land therein, "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws," the grantee of such lands cannot be deprived thereof because of the discovery of minerals in them subsequent to the grant.—*Smith v. Hill*, Cal., 26 Pac. Rep. 644.

89. PUBLIC LANDS—Town site Lots.—A party who has actually occupied and improved a lot on a town-site, entered under sections 2387-2389, Rev. St. U. S., need not necessarily be an actual resident of such town site, to entitle him to recover possession of such lot. If he is a *bona fide* occupant of a portion of the town site, he has a right to have his possession protected.—*Greiner v. Fulton*, Kan., 26 Pac. Rep. 705.

90. PUBLIC LANDS—Town site Patent.—Rev. St. U. S. tit. 32, ch. 8, relating to the entry of public lands occupied as a town-site, and providing (section 2392), that "no title shall be acquired" under its provisions "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim, or possession held under existing laws," preserves, as against title held under said act, only mines and mining claims and possessions known at the date of the town site patent.—*Davis v. Wiebbold*, U. S. S. C., 11 S. C. Rep. 628.

91. RAILROAD COMPANIES — Accidents at Crossings.— The facts that defendant's train was running at from 15 to 20 miles per hour, and that no signals were given, do not constitute wilful intent to inflict injury, at a crossing which is not "a crowded thoroughfare," but, at most, only "a considerably traveled public road."—*Georgia Pac. R. Co. v. Lee*, Ala., 9 South. Rep. 230.

92. RAILROAD COMPANIES — Consolidation.—Where a railroad company is consolidated with another, its land vests in the latter.—*Cashman v. Brownlee*, Ind., 27 N. E. Rep. 560.

93. RAILROAD COMPANIES—Insolvency—Preferences.— A claim for supplies furnished for operating a railroad before the appointment of a receiver may be ordered paid out of the fund arising from the sale of the road, in preference to the mortgage bondholders.—*Kneeland v. Bass Foundry & Machine works*, U. S. S. C., 11 S. C. Rep. 857.

94. RAILROAD COMPANIES—Mortgages.—The stock that a railroad company owns in an elevator company which owns and operates an elevator near the terminus

of the railroad company, which uses the elevator for the storage of grain, is not an "appurtenance" of the railroad, and does not pass under a mortgage of such railroad "and its appurtenances."—*Humphreys v. McKissock*, U. S. S. C., 11 S. C. Rep. 779.

95. RAILROAD COMPANIES — Negligence — Crossing.—Upon the facts of the case *held* that plaintiff could recover notwithstanding his contributory negligence.—*Hanlon v. Mo. Pac. Ry. Co.*, Mo., 16 S. W. Rep. 233.

96. RAILROAD COMPANIES — Stock Killing.—The fact that a herder, after having rounded up his sheep a mile and a quarter from a railroad track, and after some of them have lain down as if for the night, takes his dog and goes home, is not such contributory negligence as will relieve the railroad company from liability if the sheep afterwards stray on the track and are negligently killed.—*McCoy v. Southern Pac. Co.*, Cal., 26 Pac. Rep. 629.

97. RAILROADS—Municipal Aid Bonds.—The holder of bonds issued by a town in payment of its subscription to railroad stock, which bonds had been held void, sued the town and the railroad company, and procured a decree, the town not objecting, that the bonds should be surrendered and canceled, and the stock, in payment of which they were issued, transferred by the town to him: *Held*, that he is in the same attitude as if the town had voluntarily transferred the stock to him, and the railroad company cannot object thereto.—*Illinois G. T. Ry. Co. v. Wade*, U. S. S. C., 11 S. C. Rep. 709.

98. REAL ESTATE AGENT—Commission.—W, the president of defendant company, agreed to pay plaintiff a commission for procuring a purchaser of land which they thought belonged to W, but which belonged to the company. Plaintiff procured a purchaser, and W sold him the land. The company knew nothing of the contract with plaintiff, but ratified the sale, and made the purchase deed: *Held*, that plaintiff could not recover the commission from the company.—*Copeland v. Stoneham Tannery Co.*, Penn., 21 Atl. Rep. 825.

99. REFERENCE — Practice. — Under Rev. St. Wis. §§ 2864, 2865, the court, where the account is denied by defendant on the ground that the services were rendered under a special contract, may direct a reference without first determining the issue as to the existence of the special contract; and the referee may find as to the existence of the contract, and, if his finding is in favor of defendant's contention, may base his report thereon, without examining the account.—*Briggs v. Hiles*, Wis., 48 N. W. Rep. 800.

100. REMOVAL OF CAUSES—Application.—Though defendant's petition and bond for removal to the federal court are filed in apt time, and based upon proper grounds, they do not affect such removal, when at the time he moves the State court for an order of removal he reserves his right to remove pending the determination of a motion to dismiss and a plea in abatement theretofore filed.—*Manning v. Amy*, U. S. S. C., 11 S. C. Rep. 707.

101. REPLEVIN—Special Verdict.—In replevin against a sheriff for goods under execution against a third person, where the answer admits the seizure of part of the goods, but in effect denies that the balance were taken, a special verdict, which merely finds the value "of the goods in question" to be a certain sum, is fatally defective.—*Feder v. Daniels*, Wis., 48 N. W. Rep. 799.

102. RES ADJUDICATA.— A judgment or decree of a court of competent jurisdiction is not only final as to the subject-matter, but also as to every other matter which the parties might have litigated in the case, and which they might have had decided.—*Hentig v. Redden*, Kan., 26 Pac. Rep. 701.

103. RIPARIAN RIGHTS —Trespass. — Under St. Mass. 1866, ch. 18, authorizing the owners of land on a certain river to erect and maintain wharves "parallel with the line of their several lots as they abut upon said river, said wharves to extend to the channel of said river," and giving like authority to provide docks within the same limits, such an owner might, after erecting docks, fill the adjacent land to low-water mark, or to a point below low-water mark, and still retain a title in the dock between that land and the channel, such as would enable him to maintain a suit for trespass thereto.—*Hastings v. Grimshaw*, Mass., 27 N. E. Rep. 521.

104. SALE—Fraudulent Report to Mercantile Agency.—In an action for fraudulent representations as to his financial condition, by which it is alleged defendant secured merchandise from plaintiff on credit, a declaration alleging that defendant made certain specific false statements of his financial condition to a mercantile agency, of which plaintiffs were members, that the sale was made in reliance on this report, and that it was false, is sufficient.—*Hinchman v. Weeks*, Mich., 48 N. W. Rep. 790.

105. SALE—Rescission.—To rescind a contract for the purchase of a chattel the property purchased should be returned or offered to be returned within a reasonable time, unless it is of no value to either party.—*Gale Sulky Harrow Manuf'g Co. v. Moore*, Kan., 26 Pac. Rep. 703.

106. SALE—Warranty. — Language in an instruction which, if taken alone, would seem to mean that the rule of *caveat emptor* would prevail, and there would be no warranty of the soundness of an article if it were present, and the buyer had an opportunity of inspecting it, and if the defect were apparent, will be regarded as confined to cases of implied warranty; for a purchaser has a right to rely upon an express warranty, although he may have had an opportunity to examine the article.—*Postel v. Oard*, Ind., 27 N. E. Rep. 584.

107. SCHOOL FUNDS—Action for Deficiency.—By the provisions of Rev. St. Ind. 1881, § 4326, by the several counties are made liable for so much of the public school fund as is intrusted to them, and the annual payment of interest thereon. By sections 4390, 5904, it is made the duty of the county auditor, when premises mortgaged to secure a loan of such funds fail to sell for a sum sufficient to satisfy the principal and interest, to bring suit on the notes in the name of the State: *Held*, that the county might pay the deficiency before the auditor brought suit.—*Lopp v. Woodward*, Ind., 27 N. E. Rep. 575.

108. SCHOOLS—Election. — Since under Comp. Laws Dak. § 1814, the members of the board of education elected under its provisions were to continue in office until their successors should be elected and qualified, Act March 12, 1891, ch. 9, § 7, providing for the election of a new board, does not oust from office the members of the old board until after the new board is elected and qualified.—*In re Construction of School Law*, S. Dak., 48 N. W. Rep. 812.

109. SHIPPING— Limiting Liability. — Since navigable rivers, though tideless, are subject to the maritime law and the admiralty jurisdiction of the United States, Act June 19, 1886, § 4, which extends the benefit of the limited liability act to the owners of steam-boats used on a river in inland navigation, is a valid and constitutional law, being an amendment of the maritime law, to which they were already subject.—*Ex parte Garnett*, U. S. S. C., 11 S. C. Rep. 840.

110. SPECIFIC PERFORMANCE — Statute of Frauds.—Where the lessor of a building occupied as a saloon, verbally promises to renew the lease at its expiration for a term of years if plaintiff shall purchase the unexpired term and the saloon fixtures of the lessee, such purchase and entry into the possession do not constitute a part performance that will defeat the operation of the statute of frauds.—*Koch v. National Union Bldg. Ass'n*, Ill., 27 N. E. Rep. 530.

111. SUITS AGAINST STATE.—A suit by a citizen of one State against the persons constituting the board of land commissioners of another State, to enjoin them from reselling swamp lands claimed by plaintiff, on the ground that the statute under which they propose to act is unconstitutional as impairing plaintiff's contract of purchase from the State under a previous act, is not a suit against the State, in violation of Const. U. S. Amend. 11, but is a suit against the commissioners individually, to prevent action contrary to law.—*Pennoyer v. McConnaughy*, U. S. S. C., 11 S. C. Rep. 699.

112. SUMMONS—Service of Defective Copy.—Mistake in the copy of the summons does not render a judgment entered upon such service void, but only voidable.—*Stewart v. Bodley*, Kan., 26 Pac. Rep. 719.

113. SUPREME COURT—Jurisdiction. — A corporation held several leases on the coal under tracts of land owned by different lessors. In a suit for the appointment of a receiver all the lessors intervened in one petition to have the leases canceled: *Held*, that the amount of the interest of each lessor is the limit of the jurisdiction of the supreme court.—*Henderson v. Carbondale Coal & Coke Co.*, U. S. S. C., 11 S. C. Rep. 691.

114. TAXATION—Assessment.—Though under Rev. St. Ind. 1881, § 6416, the county auditor could, when articles of property were altogether omitted from taxation, enter such property upon the books and assess it, such power did not include the authority to revalue property which had been listed and appraised.—*Woll v. Thomas*, Ind., 27 N. E. Rep. 378.

115. TAXATION — Injunction. — A bill to restrain the levy of a distress warrant for the collection of an alleged illegal license tax, which merely alleges that the property of the plaintiff, an express company, is employed in interstate commerce, and that its seizure will greatly embarrass the company and result in heavy loss and damage to it and to the public, shows no ground for equitable interference.—*Shelton v. Platt*, U. S. S. C., 11 S. C. Rep. 646.

116. TAXATION—Railroad Company.—Where a tax is levied for a public purpose and the rule of equality has been observed in making the levy, its payment cannot be defeated by showing that no direct or pecuniary benefit will accrue to either the property or its owner from the proposed expenditure of the funds raised by the tax.—*N. Y., etc. R. Co. v. Commissioners*, Ohio, 27 N. E. Rep. 548.

117. TAXATION—Uniformity.—Act S. D. March 9, 1891, §§ 18, 19, allowing persons, in listing credits for taxation, to deduct from the gross amount thereof all *bona fide* indebtedness, and further providing that deductions from the amount of personal property shall be allowed such indebtedness only as is due within the State; and making no provision for deducting indebtedness from the value of real estate,—are in contravention of Const. S. D. art. 11, § 2, requiring taxes to be uniform on all real and personal property according to its value, and section 4, providing that the legislature shall provide for taxing all moneys, credits, etc.—*In re Construction of Revenue Law*, S. Dak., 48 N. W. Rep. 813.

118. TAX-TITLES—Priority.—Two surveys which overlapped were sold for taxes at different times, and bought in by the county. Afterwards the county sold both tracts on the same day, each of them to a different purchaser: *Held*, that the purchaser of the tract first sold to the county took title to that part of the land included in both surveys.—*McCloskey v. Kunes*, Penn., 21 Atl. Rep. 823.

119. TAX-TITLES—Redemption.—Under Rev. St. Ill. ch. 120, § 216, which provides that a redemption notice shall state for what year the land was taxed or especially assessed, a notice which incorrectly states the year for which the land was assessed is insufficient to support a tax-title.—*Brophy v. Harding*, Ill., 27 N. E. Rep. 523.

120. TOWN—Defective Highways— Negligence.—In an action against a town for personal injuries from a defect in the highway, consisting of a telegraph wire sloping from a house and laying across the road, it appeared that the wire was caught in the wheels of a wagon approaching plaintiff, and that he was hurt in bending back in his seat to get under the wire as it reached him: *Held*, that if the other driver was not negligent, his co-operation with the defect in producing the injury would not prevent recovery therefor.—*Hayes v. Town of Hyde Park*, Mass., 27 N. E. Rep. 522.

121. TRIAL—Struck Jury.—Under Code Ala. § 2752, providing that, where either party demands a struck jury, the sheriff shall furnish a list of 24 jurors, from which the struck jury must be obtained by the attorneys alternately striking 12 from the list, if, after the jury has been thus obtained, one of them is excused, the court cannot replace him by recalling those stricken off, but must have another jury struck from a new list.—*Birmingham Union St. R. Co. v. Ralph*, Ala., 9 South. Rep. 222.

122. TRUST FUND—Depreciation—Loss.— When a fund is held in trust for the benefit of one person for life and to go to another in remainder, and a loss of a part of the fund occurs, arising out of insufficient security of a particular investment, such loss is to be apportioned between the tenant for life and remainder-man in the proportion which the principal sum involved in the insufficient security bears to the interest due upon it at the time when the security is realized upon and the amount of the loss determined.—*Hagan v. Platt*, N. J., 21 Atl. Rep. 860.

123. WASTE—Judgment.—Under Rev. St. Ind. 1881, § 286, providing that waste shall be remediable by action "in which there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises," but that forfeiture and eviction shall not be adjudged, except when the injury to the estate in reversion shall be adjudged equal to the unexpired term, or to have been done in malice, a forfeiture will not follow a judgment for possession before a justice of the peace, in which there is no such finding, though he may have been ejected for waste.—*Sullivan v. O'Hara*, Ind., 27 N. E. Rep. 590.

124. WATERS—Riparian Rights—Surveys.—In case of a grant by the United States of land situated on a non-navigable lake, the body of water, and not the meander line in the government survey, is the boundary, and the fact that a tongue land projects out into the water beyond the meander line does not give the land department the right to afterwards survey and grant it, if there was no fraud or mistake in the first survey.—*Mitchell v. Smale*, U. S. S. C., 11 S. C. Rep. 819.

125. WATER-RIGHTS — Irrigation — Contracts. — An agreement between parties who have settled upon lands in the vicinity of a stream of water capable of being utilized for the purposes of irrigation, as to the appropriation of the water for such purpose, and as to the relative quantity which each shall be entitled to use, where such agreement has been acted upon for a long time by the parties, and a violation of it by any of them would produce irreparable damage to others, will be enforced in a court of equity.—*Combs v. Slayton*, Oreg., 26 Pac. Rep. 661.

126. WILLS—Construction.— Testator disposed of all his property, intending to give each of his children an equal share, and then provided that if any of his children, or if a trustee named in the will, should think the division unequal, then, at any time within two years after his death, on the request of either of his children or of said trustee, a valuation should be made in a way specified, and the shares of each child made equal: *Held*, that the disposition made by the will could not be disturbed unless one of the children, or the trustee, within two years after testator's death, thought the division unequal, and asked a revision.—*Pond v. Hopkins*, Mass., 27 N. E. Rep. 517.

127. WILLS—Probate.—How. St. Mich. §§ 5804-5807, provide that wills duly probated in other States may be allowed and recorded in any county in which the testator may have property, if, on hearing, it shall appear proper to the probate court, and that an authenticated copy shall be filed and recorded, and shall have the same effect as if originally proved there: *Held*, that a will thus duly proved and allowed, although the court neglected to record it, passed the title to the property.—*Clow v. Plummer*, Mich., 48 N. W. Rep. 795.

128. WITNESS — Impeachment. — Where a witness sought to be impeached has within a few months changed his residence from one State to another it is not error to permit witnesses, who knew him a long time in his former place of residence, to testify as to his reputation for truth and veracity there.—*Coates v. Sulan*, Kan., 26 Pac. Rep. 720.